S. HRG. 99-146

IRAN CLAIMS LEGISLATION

HEARING

BEFORE THE

COMMITTEE ON FOREIGN RELATIONS
UNITED STATES SENATE

NINETY-NINTH CONGRESS

FIRST SESSION

ON

S. 771

A BILL TO FACILITATE THE ADJUDICATION OF CERTAIN CLAIMS OF UNITED STATES NATIONALS AGAINST IRAN, TO AUTHORIZE THE RECOVERY OF COSTS INCURRED BY THE UNITED STATES IN CONNECTION WITH THE ARBITRATION OF CLAIMS OF UNITED STATES NATIONALS AGAINST IRAN, AND FOR OTHER PURPOSES

AND

S. 1166

A BILL TO FACILITATE THE ADJUDICATION OF CERTAIN CLAIMS OF UNITED STATES NATIONALS AGAINST IRAN, TO AUTHORIZE THE RECOVERY OF COSTS INCURRED BY THE UNITED STATES IN CONNECTION WITH THE ARBITRATION OF CLAIMS OF UNITED STATES NATIONALS AGAINST IRAN, AND FOR OTHER PURPOSES

MAY 20, 1985

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IRAN CLAIMS LEGISLATION

MONDAY, MAY 20, 1985

UNITED STATES SENATE,
COMMITTEE ON FOREIGN RELATIONS,
Washington, DC.

The committee met, pursuant to notice, at 2 p.m., in room SD-419, Dirksen Senate Office Building, Hon. Dan Evans presiding.

Senators present: Senators Evans and Helms.

Senator EVANS. Two o'clock having arrived, the Foreign Relations Committee will open its session on Iran claims legislation. The fact we are starting at 2 o'clock is part of my small effort to ensure that all committees start on time, which gives all Senators an opportunity to ensure that they are there on time.

I am pleased to convene this hearing today to receive testimony on Iranian claims legislation. The committee has two bills before it. One is the administration's proposal, S. 771, which was introduced by request on March 28. The other is S. 1166, which Senator Lugar and I introduced on Friday. Both bills provide statutory authority for the Foreign Claims Settlement Commission to make awards to small claimants. This authority will be used in the event the Department of State reaches an en bloc settlement of the small claims with Iran.

Both bills would also grant a narrow exception to the Freedom of Information Act for papers relating to the Iranian Claims Tribunal. This exemption will permit Department officials and private claimants to share confidential materials among themselves without risking their disclosure under the Freedom of Information Act.

Finally, both the Evans-Lugar bill and the administration bill would levy a fee on awards received by claimants. The U.S. Government incurs significant costs in supporting the Iran-United States Claims Tribunal. It also provides valuable representational and advisory services to all claimants. Both bills would require those who benefit from these services to defray a portion of their costs.

Where the two bills differ is in the amount of the fee. The administration has proposed deducting a flat 2 percent from all awards. Our bill sets the fee at 1.5 percent of the first $5 million, and 1 percent on the remainder. This revised schedule was developed to meet two objections raised by the administration's bill.

First, it has been noted that the U.S. Government itself has a number of claims pending before the tribunal. Accordingly, some of the costs the Government will incur will be incurred whether or not there were any private claims. In these circumstances, fairness suggested that the Government pay a greater share of the total

costs of supporting the tribunal. Thus, the fee on all claims is reduced from 2 to 1.5 percent in the Evans-Lugar bill.

A second difference between the administration's bill and ours is that our bill reduces the fee on awards above $5 million. This difference also reflects fairness consideration. As Judge Kozinski of the U.S. Court of Claims noted in his oral ruling in the Sperry litigation, the services received by larger claimants do not increase proportionately with the size of the award.

Our bill attempts—granted somewhat roughly—to match the benefits received with the amount charged. The $5 million cutoff was developed by committee staff in consultation with representatives of the administration. Judge Kozinski's ruling in the Sperry litigation has made swift action on this legislation imperative. Without a bill, the fees collected by the administration to date under the authority of the Independent Offices Appropriation Act will have to be returned in total, nor can additional fees be collected. The net loss to the treasury could approach $20 million.

Chairman Lugar and I promised to move swiftly on a bill. Seldom, if ever, does the Foreign Relations Committee have an opportunity to restore funds to the public first. We pledged that this oportunity will not be lost.

[The text of S. 771 and S. 1166 follows:]

II

99TH CONGRESS
1ST SESSION

S. 771

To facilitate the adjudication of certain claims of United States nationals against Iran, to authorize the recovery of costs incurred by the United States in connection with the arbitration of claims of United States nationals against Iran, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MARCH 28 (legislative day, FEBRUARY 18), 1985

Mr. LUGAR (by request) introduced the following bill; which was read twice and referred to the Committee on Foreign Relations

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A BILL

To facilitate the adjudication of certain claims of United States nationals against Iran, to authorize the recovery of costs incurred by the United States in connection with the arbitration of claims of United States nationals against Iran, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Iran Claims Act".

RECEIPT AND DETERMINATION OF CERTAIN CLAIMS

SEC. 2. (a) The Foreign Claims Settlement Commission of the United States is hereby authorized to receive and determine, in accordance with the provisions of title I of the

International Claims Settlement Act of 1949, the validity and amounts of claims by nationals of the United States against Iran which are settled en bloc by the United States. In deciding such claims, the Commission shall apply, in the following order, the terms of any settlement agreement, the relevant provisions of the Declarations of the Government of the Democratic and Popular Republic of Algeria of January 19, 1981, giving consideration to interpretations thereof by the Iran-United States Claims Tribunal, and applicable principles of international law, justice, and equity.

(b) The Commission shall certify to the Secretary of the Treasury any awards determined pursuant to subsection (a) of this section in accordance with section 5 of title I of the International Claims Settlement Act of 1949. Such awards shall be paid in accordance with sections 7 and 8 of that title, except that—

(1) the Secretary of the Treasury is authorized to make payments pursuant to section 8(c)(1) in the amount of $10,000 or the principal amount of the award, whichever is less; and

(2) the Secretary of the Treasury is authorized to deduct pursuant to section 7(b) an amount equal to 2 per centum, instead of 5 per centum, of payments made pursuant to section 8(c).

DEDUCTIONS FROM ARBITRAL AWARDS

SEC. 3. (a) Except as provided in section 4, whenever the Federal Reserve Bank of New York shall receive an amount from the Security Account established pursuant to the Declarations of the Democratic and Popular Republic of Algeria of January 19, 1981, in satisfaction of an award rendered by the Iran-United States Claim Tribunal in favor of a United States national, the Federal Reserve Bank of New York as fiscal agent of the United States shall deduct from the amount so received an amount equal to two percent thereof as reimbursement to the United States Government for expenses incurred in connection with the arbitration of claims of United States nationals against Iran before the Iran-United States Claims Tribunal and the maintenance of the Security Account.

(b) Amounts deducted by the Federal Reserve Bank of New York pursuant to subsection (a) shall be deposited into the Treasury to the credit of miscellaneous receipts.

(c) Nothing in this section shall be construed to affect the payment to United States nationals of amounts received by the Federal Reserve Bank of New York in respect of awards by the Iran-United States Claims Tribunal, after deduction of the amounts specified in subsection (a).

(d) This section shall be effective as of June 7, 1982.

EN BLOC SETTLEMENT

SEC. 4. The deduction by the Federal Reserve Bank of New York provided for in section 3(a) of this Act shall not apply in the case of a sum received by the Bank pursuant to an en bloc settlement of any category of claims of United States nationals against Iran when such sum is to be used for payments in satisfaction of awards certified by the Foreign Claims Settlement Commission pursuant to section 2(b) of this Act.

REIMBURSEMENT TO THE FEDERAL RESERVE BANK OF NEW YORK

SEC. 5. The Secretary of the Treasury is hereby authorized to reimburse the Federal Reserve Bank of New York for expenses incurred by the bank in the performance of fiscal agency agreements relating to the settlement or arbitration of claims pursuant to the Declarations of the Democratic and Popular Republic of Algeria of January 19, 1981.

CONFIDENTIALITY OF RECORDS

SEC. 6. Notwithstanding the provisions of the Freedom of Information Act, section 552 of title 5, United States Code, records pertaining to the arbitration of claims before the Iran-United States Claims Tribunal shall be prohibited from disclosure to the general public except that—

(1) rules, awards, and other decisions of the Tribunal and claims and responsive pleadings filed at the Tribunal by the United States on its own behalf shall

be made available to the public unless the Secretary of State or his designee determines that public disclosure would be prejudicial to the interests of the United States or United States claimants in proceedings before the Tribunal, or that public disclosure would be contrary to the rules of the Tribunal; and

(2) the Secretary of State or his designee may determine on a case-by-case basis to make such information available when in his judgment the interests of justice requires.

II

99TH CONGRESS
1ST SESSION

S. 1166

To facilitate the adjudication of certain claims of United States nationals against Iran, to authorize the recovery of costs incurred by the United States in connection with the arbitration of claims of United States nationals against Iran, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MAY 17 (legislative day, APRIL 15), 1985

Mr. EVANS (for himself and Mr. LUGAR) introduced the following bill; which was read twice and referred to the Committee on Foreign Relations

---

A BILL

To facilitate the adjudication of certain claims of United States nationals against Iran, to authorize the recovery of costs incurred by the United States in connection with the arbitration of claims of United States nationals against Iran, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Iran Claims Settlement Act".

RECEIPT AND DETERMINATION OF CERTAIN CLAIMS

SEC. 2. (a) The Foreign Claims Settlement Commission of the United States is authorized to receive and determine,

in accordance with the provisions of title I of the International Claims Settlement Act of 1949, the validity and amounts of claims by nationals of the United States against Iran which are settled en bloc by the United States. In deciding such claims, the Commission shall apply, in the following order, the terms of any settlement agreement, the relevant provisions of the Declarations of the Government of the Democratic and Popular Republic of Algeria of January 19, 1981, giving consideration to interpretations thereof by the Iran-United States Claims Tribunal, and applicable principles of international law, justice, and equity.

(b) The Commission shall certify to the Secretary of the Treasury any awards determined pursuant to subsection (a) of this section in accordance with section 5 of title I of the International Claims Settlement Act of 1949. Such awards shall be paid in accordance with sections 7 and 8 of that title, except that—

(1) the Secretary of the Treasury is authorized to make payments pursuant to paragraphs (1) and (2) of section 8(c) in the amount of $10,000 or the principal amount of the award, whichever is less; and

(2) the Secretary of the Treasury is authorized to deduct pursuant to section 7(b) an amount calculated in accordance with section 3(a), instead of 5 per centum, of payments made pursuant to section 8(c).

DEDUCTIONS FROM ARBITRAL AWARDS

SEC. 3. (a) Except as provided in section 4, whenever the Federal Reserve Bank of New York shall receive an amount from the Security Account established pursuant to the Declarations of the Democratic and Popular Republic of Algeria of January 19, 1981, in satisfaction of an award rendered by the Iran-United States Claim Tribunal in favor of a United States claimant, the Federal Reserve Bank of New York shall deduct from the amount so received, for the aggregate amount awarded under each ennumerated claim before the tribunal, an amount equal to one and one-half percent up to and including a total awarded of $5,000,000 and one percent thereafter, as reimbursement to the United States Government for expenses incurred in connection with the arbitration of claims of United States claimants against Iran before the Iran-United States Claims Tribunal and the maintenance of the Security Account.

(b) Amounts deducted by the Federal Reserve Bank of New York pursuant to subsection (a) shall be deposited into the Treasury of the United States to the credit of miscellaneous receipts.

(c) Nothing in this section shall be construed to affect the payment to United States claimants of amounts received by the Federal Reserve Bank of New York in respect of awards by the Iran-United States Claims Tribunal, after de-

duction of the amounts calculated in accordance with subsection (a).

(d) This section shall be effective as of June 7, 1982.

EN BLOC SETTLEMENT

SEC. 4. The deduction by the Federal Reserve Bank of New York provided for in section 3(a) of this Act shall not apply in the case of a sum received by the Bank pursuant to an en bloc settlement of any category of claims of United States nationals against Iran when such sum is to be used for payments in satisfaction of awards certified by the Foreign Claims Settlement Commission pursuant to section 2(b) of this Act.

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(1) rules, awards, and other decisions of the Tribunal and claims and responsive pleadings filed at the Tribunal by the United States on its own behalf shall be made available to the public unless the Secretary of State or his designee determines that public disclosure would be prejudicial to the interests of the United States or United States claimants in proceedings before the Tribunal, or that public disclosure would be contrary to the rules of the Tribunal; and

(2) the Secretary of State or his designee may determine on a case-by-case basis to make such information available when in his judgment the interests of justice requires.

Senator EVANS. Today we will hear first from the administration. Appearing on its behalf is Michael Matheson, Deputy Legal Adviser to the Department of State.

After Mr. Matheson, we will hear from representatives of private claimants. Those who did not have a chance to prepare testimony for today's hearing are encouraged to submit comments for the committee record.

By unanimous consent, the record will remain open 1 week for additional written views on the legislation.

With that, Mr. Matheson, I see you have a rather lengthy statement. If you would summarize it for us, we will see that it is printed in its entirety in the record.

STATEMENT OF MICHAEL J. MATHESON, DEPUTY LEGAL ADVISER, DEPARTMENT OF STATE; ACCOMPANIED BY DAVID STEWART, ASSISTANT LEGAL ADVISER, INTERNATIONAL CLAIMS AND INVESTMENT DISPUTES, DEPARTMENT OF STATE

Mr. MATHESON. Thank you, Mr. Chairman. I would be very happy to do that, and I will try to summarize the highlights of my prepared statement now.

I want to thank you, first of all, for the opportunity to testify in support of the legislation under consideration today. The Iran Claims Act was originally introduced in the 97th Congress, and again in the 98th Congress. Recent developments in a suit against the United States make prompt action on the bill especially important at this time, and we very much appreciate the committee's willingness to act with such short notice.

The Iran Claims Act contains several important provisions designed to further the resolution of claims between U.S. nationals and the Government of Iran pursuant to the Algiers Accords of 1981. I would like to review briefly the nature and function of the Iran-United States Claims Tribunal, the provisions of the proposed legislation, and the reasons why the administration strongly supports its prompt adoption.

As you know, the need for the Iran-United States Claims Tribunal arose as a result of the Islamic revolution in Iran and the unlawful seizure of the U.S. Embassy. As a result of these events, extensive contractual arrangements between the government of Iran and U.S. nationals were breached and many American investments in Iran were expropriated. The disposition of private claims against Iran was therefore a major issue in the resolution of the hostage crisis.

The Algiers accords which led to the release of the hostages also included provisions for the resolution of these private claims. The Accords created the Iran-United States Claims Tribunal to hear the claims, as well as certain government-to-government disputes, and established a security account, initially funded at $1 billion from blocked Iranian assets, to secure payments of Tribunal awards in favor of U.S. nationals.

Over 85 percent of the Tribunal's caseload was filed by private U.S. nationals. This included over 500 claims for $250,000 or more, the so-called large claims; and nearly 2,800 claims for less than $250,000 each, or the so-called small claims. Since its establish-

ment, the Tribunal has concentrated most of its efforts on resolving the large claims filed by U.S. nationals. To date, about one-third of them have been resolved, resulting in payment from the Security Account of over $343 million.

The Tribunal has issued a number of decisions of important benefit to U.S. claimants. For example, in 1982 the Tribunal decided that interest earned on the Security Account which now totals well over $400 million would not be paid to Iran, but retained instead in a separate suspense account which can be used to replenish the Security Account when necessary, thus providing an important further source of assurance of payment of Tribunal awards to American claimants.

In a series of decisions in 1983, the Tribunal reaffirmed the traditional international standard of prompt, adequate, and effective compensation for expropriations and rejected Iranian arguments that the law had changed to permit a lesser standard. In 1984, the Tribunal rejected Iranian attempts to exclude the claims of all U.S. nationals who also held Iranian citizenship, and decided instead that dual nationals with dominant and effective U.S. nationality could maintain their claims before the Tribunal.

Now I do not mean to paint a wholly rosy picture of the Tribunal. Its progress has not been smooth or consistent. For example, last September two of the Iranian arbitrators physically assaulted one of the third-country arbitrators in the Tribunal building and threatened further physical violence if he returned. This attack brought Tribunal proceedings to an abrupt halt, which only ended when the two Iranians were replaced by their government after a formal U.S. challenge.

However, the Tribunal is now fully staffed and back in operation under a new and vigorous president, and we expect it to continue making progress in resolving the outstanding claims of U.S. nationals.

Turning now to the proposed legislation, we have attempted to explain its provisions in some detail, both in my statement for the record and in the administration's section-by-section anaylsis, so I would like only to highlight its significant provisions at this point.

Section 2 gives the Foreign Claims Settlement Commission, which is a component of the Department of Justice, standby authority to adjudicate any claims which may be settled en bloc by Iran and the United States. This is intended to facilitate the expeditious resolution of the nearly 2,800 small claims before the Tribunal if an en bloc settlement with Iran should be concluded.

Section 2 is necessary because the Foreign Claims Settlement Commission's current statutory authority is limited to claims arising from nationalizations and other takings of property, whereas the small claims before the Tribunal also include those arising from debts and contracts.

Section 3 is designed to provide a mechanism for the reimbursement to the U.S. Government of significant expenses it incurs in carrying out the provisions of the Algiers accords that provide a special benefit to private U.S. claimants. The U.S. Government contributes $900,000 a year for the maintenance of the Security Account, and a little over $2 million a year for the operations of the Tribunal. In addition, the State Department and other government

agencies spend about $1 million a year to provide assistance to U.S. claimants, for a total U.S. Government expenditure of about $4 million.

The Department itself prepares and presents the claims of all small claimants to the Tribunal. It assists the large claimants, who are represented by their own attorneys, by counseling them on substantive, procedural, and tactical matters, attending their proceedings and presenting the views of the U.S. Government on significant common issues, and working to keep the Tribunal functioning as expeditiously and fairly as possible.

We believe it is reasonable for successful claimants to bear the costs of the mechanism from which they benefit. Section 3 of the proposed administration legislation would therefore authorize the deduction of 2 percent from any payment from the Security Account in satisfaction of an award of the Tribunal in favor of a U.S. national.

This provision is consistent with long-standing U.S. Government policy of requiring payment for the provision of special benefits to specific classes of Americans.

In particular, it is reasonable in light of the customary treatment of similar groups with claims against foreign governments, as is demonstrated by the 5 percent deducted under U.S. law from awards made by the Foreign Claims Settlement Commission.

As you know, since 1982 the Treasury Department has been deducting 2 percent of the amount awarded to each successful claimant under the authority of the Independent Offices Appropriation Act, which is a general user-fee statute. But at the same time that the Treasury Department began making these deductions, the administration submitted the proposed Iran Claims Act to Congress, because we believed—and we still believe—that Congress should ultimately be the one to decide on an appropriate fee structure.

The validity of the Treasury deductions was subsequently challenged in the U.S. Claims Court by one of the successful U.S. claimants before the Tribunal. In a recent oral ruling, Judge Kozinski indicated that these deductions did not, in his opinion, meet the specific requirements of the Independent Offices Appropriation Act, and that he would order the Government therefore to return the 2 percent collected from that particular claimant.

This could result in a chaotic situation, not only because it calls into question the Government's ability to continue collecting fees, but also because there will now likely be suits from some or all of the remaining successful U.S. claimants seeking similar recovery. Action on this legislation is therefore particularly important now to rectify the situation and preclude a loss of revenue.

We continue to believe that deductions at a flat 2 percent rate are on the whole the most equitable. We recognize, however, that there is disagreement with our position on the part of some claimants, and the Congress clearly needs to take some decision to accommodate these different views.

The two-tier approach which you have proposed, Mr. Chairman, reflects a compromise which the administration is therefore prepared to accept. It would require a refund to the claimants of $2.4 million of the amounts already collected, and will reduce the amounts ultimately recovered by about one-third. Nonetheless, the

United States would be reimbursed for a substantial portion of Tribunal-related expenses, and the principle would be preserved that claimants in such a situation should bear a reasonable share of such expenses.

To summarize, we think that the prompt passage of the Iran Claims Act is essential. The legislation will allow the Government to more effectively represent the interests of the U.S. nationals. Small claimants would particularly benefit, since it not only provides standby authority for adjudication by the Foreign Claims Settlement Commission, but does so at a fee significantly less than that currently required by law.

We believe that the legislation fairly allocates to all claimants the costs incurred by the Government in providing them with an effective forum for the resolution of their private financial disputes with Iran, and access to a source of funds from which to satisfy their awards.

Mr. Chairman, that concludes my presentation. I have with me Mr. David Stewart, who is the head of the International Claims Office within the State Department, and we would be very happy to answer your questions.

[Mr. Matheson's prepared statement follows:]

STATEMENT OF
MICHAEL J MATHESON
Deputy Legal Adviser
Department of State
Before the
Committee on Foreign Relations
United States Senate
May 20, 1985

I want to thank you for this opportunity to testify in support of the legislation under consideration today, the Iran Claims Act. This bill was originally introduced in the 97th Congress as S. 2967 and in the 98th Congress as S. 1072. Recent developments in a suit brought against the United States make prompt action on the Iran Claims Act especially important at this time and we appreciate the Committee's willingness to act with such short notice.

The Iran Claims Act contains several important provisions which authorize various agencies of the Executive Branch to act in furtherance of the settlement of claims between United States nationals and the Government of Iran pursuant to the Algiers Accords of January 19, 1981. The bill would authorize the Foreign Claims Settlement Commission to adjudicate certain of thos claims in the event they are settled by bilateral agreement between Iran and the United States. It would also authorize the Secretary of the Treasury to reimburse the Federal Reserve Bank of New York for its expenses as fiscal agent of the United States in the implementation of the Algiers Accords and would maintain the confidentiality of certain records pertaining to the arbitration of claims before the Tribunal. Finally, it would

authorize the recovery from successful claimants of a portion of the costs incurred by the United States Government in connection with the arbitration of claims before the Iran-United States Claims Tribunal at The Hague and the maintenance of the Security Account from which successful U.S. claimants are paid.

I would like to review briefly for you the nature and function of the Tribunal, the provisions of the proposed legislation, and the reasons why the Department of State strongly supports quick passage of the legislation.

The Tribunal

As you know, the need for the Iran-United States Claims Tribunal arose as a result of the Islamic Revolution in Iran, the unlawful seizure of the United States Embassy in Tehran on November 3, 1979, and the subsequent detention of American diplomatic and consular personnel for more than a year. As a result of these events, longstanding and extensive economic and commercial relationships between the two countries were abruptly destroyed. The extent of these relationships is reflected by the fact that U.S.-Iran bilateral trade in 1977 was $5.7 billion. Contractual arrangements between the Government of Iran and U.S. nationals were breached and many American investments in Iran were expropriated. In response, many U.S. nationals with claims against Iran obtained prejudgment attachments in U.S. courts on a substantial proportion of the frozen Iranian assets in this country. The disposition of these private claims against Iran was a major issue in resolving the hostage crisis.

The Algiers Accords, which led to the release of the hostages and the transfer of Iranian Government assets, also included provisions for the resolution of these private commercial claims of U.S. nationals against Iran. The Accords created the Iran-United States Claims Tribunal to hear these claims against Iran. They also established a Security Account, initially funded at $1 billion from blocked Iranian assets in the United States, to secure the payment of awards made in favor of U.S. nationals.

The Tribunal is not available to the general American public. Rather, the Tribunal and the Security Account are available only to a special class of U.S. nationals -- those with claims against the Government of Iran, its agencies, and controlled entities which arise out of debts, contracts, expropriations and other measures affecting property rights. In addition, the Tribunal has jurisdiction to hear government to government contract claims, cases involving the interpretation of the Accords themselves and limited types of claims between U.S. and Iranian banks.

Over 85 percent of the Tribunal's original caseload of 3,848 claims was filed by U.S. nationals. This included 518 claims for $250,000 or more (the "large claims") and 2,795 claims for less than $250,000 each (the "small claims"). Since its establishment in the summer of 1981, the Tribunal has concentrated most of its efforts on resolving the large claims filed by U.S. nationals. Almost all of the 164 prehearing conferences and 135 hearings to date have dealt with large claims and 179 of them have been

resolved through adjudication, settlement or withdrawal. Of these, 127 claims have resulted in payment from the Security Account of over $343 million. During this same period, the Tribunal has resolved 24 of the 70 government to government cases on the pleadings, 6 interpretive disputes (4 of which had significant consequences for U.S. national claimants), and 97 of the small claims (10 of which resulted in payment to U.S. nationals).

To give you an idea of the types of questions that U.S. nationals' claims present to the Tribunal and the assistance which the United States Government provides to claimants, let me just mention a few of the issues which the Tribunal has resolved. The first decision rendered by the Tribunal held that settlements between arbitrating parties could be paid from the Security Account when the Tribunal approves the settlement and issues an award on agreed terms. This decision, which resulted from an interpretive dispute between the two Governments and was briefed and argued by State Department lawyers, has enabled many American claimants to resolve their claims against Iran in an expeditious manner.

The Tribunal's next decision, also arising from an interpretive dispute between the two Governments, was even more important for American claimants. The Tribunal decided that interest earned on the $1 billion Security Account should not be paid directly to Iran, but should continue to be credited to a separate suspense account which can be used to replenish the Security Account when necessary. To date, over $400 million has

been credited to that account, providing further assurance of immediate payment of Tribunal awards to American claimants.

Other interpretive disputes between the two governments have resulted in Tribunal decisions affecting large numbers of private claims. For example, the Tribunal held it does not have jurisdiction over claims by one government against the nationals of the other. As a result of this decision, Iran withdrew over 1,400 claims from the Tribunal. In another decision, the Tribunal found that it had only limited jurisdiction over claims by Iran and Iranian banks based on standby letters of credit issued at the behest of numerous U.S. companies. In contrast, the Tribunal has held that it does have jurisdiction over claims against Iran by U.S. nationals who are also citizens of Iran where their dominant and effective nationality is that of the United States.

In a number of instances, the Tribunal has decided issues of major importance to private American claimants in the context of an individual claim. For example, in order to present a claim before the Tribunal, U.S. corporations have to prove that they were organized under the laws of the U.S. and that the majority of their stockholders were citizens of the U.S. Based on evidence developed through extensive efforts of the State Department, the Tribunal established a presumption in favor of U.S. nationality for corporations which are widely held by resident U.S. shareholders. Although Iran has challenged this presumption by filing an interpretive dispute, the Tribunal

continues to apply the presumption in judging corporate nationality. (Parenthetically, the United States response to Iran's challenge cost about $120,000 to prepare, including substantial Treasury Department computer time.)

In the context of other private American claims, the Tribunal has resolved questions such as the proper standard of compensation for expropriations, the definition of government control of an entity, the Tribunal's authority to award interest, and the status of partnership claims. In all these cases, the State Department submitted briefs and coordinated a U.S. position which was favorably received by the Tribunal. With regard to the proper standard of compensation for expropriations, the Tribunal agreed with the United States position that the traditional international standard of prompt, adequate and effective compensation remained valid and rejected the Iranian argument that the law had changed to permit a lesser standard of compensation.

I do not mean to paint a wholly rosy picture of the Tribunal. The Tribunal's progress has not been smooth or consistent. Last September, in an action unprecedented in the history of arbitral tribunals, two of the Iranian arbitrators physically attacked one of the third-country arbitrators, Judge Nils Mangard, in the entryway to the Tribunal. The two Iranian arbitrators not only refused to apologize for the attack, but they also threatened further physical violence if Judge Mangard returned to the Tribunal. As you can imagine, the attack brought

Tribunal proceedings to an abrupt halt that lasted over four months. In response to a formal United States challenge demanding the withdrawal of these two Iranian arbitrators, the Government of Iran recalled them and appointed two new arbitrators. The new Iranian arbitrators assumed their positions in January of this year, thus permitting a resumption of normal Tribunal operations. There has also been a complete turnover in the third-country arbitrators over the past nine months. In an encouraging development, the most recent selection of two new third-country arbitrators resulted by agreement between Iran and the United States. While we do not deny that there have been exasperating delays in arbitrating the private claims, we believe that the Tribunal, particularly as presently constituted, will continue to make progress in resolving the outstanding claims of U.S. nationals against Iran.

The Proposed Legislation

The purpose of the proposed Iran Claims Act is to facilitate the adjudication of private claims against Iran and to permit the Government to recover from successful claimants certain of its expenses related to the arbitration of those claims -- expenses which would otherwise be borne by the general taxpayer. The proposed legislation contains five provisions, two of which are technical (Sections 4 and 5) and three substantive in nature (Sections 2, 3, and 6). The technical provisions are straightforward and require no further explanation. Section 4 prevents duplicative deductions from awards to successful

claimants and Section 5 authorizes the Secretary of the Treasury to reimburse the Federal Reserve Bank of New York for its expenses as Fiscal Agent in the implementation of the Algiers Accords.

Section 2

This section gives the Foreign Claims Settlement Commission (the "Commission"), a component of the Department of Justice, standby authority to adjudicate any claims which are settled en bloc by Iran and the United States. As I mentioned before, 2,795 of the U.S. national claims originally filed were for less than $250,000 each. (Of these, 2,698 remain pending.) The adjudication of these small claims represents a tremendous workload for the Tribunal. The Tribunal has hired three senior legal officers and a law clerk to work exclusively on these claims. Even so, their adjudication could take years to complete. We believe that the Commission could expeditiously adjudicate these claims and the United States has proposed that these small claims be settled en bloc between the two Governments. While Iran initially agreed in principle, it has since been unwilling to negotiate such an agreement. Although we cannot predict when such a settlement would occur, the actual granting of standby authority to the Commission evidences our desire and readiness to reach an agreement with Iran which would decrease the burdens on the Tribunal and speed the arbitration of the large claims.

Section 2 clarifies the statutory authority of the Commission to adjudicate any claims settled en bloc by Iran and the United

States. The section is necessary because the Commission's jursidiction is limited by its enabling statute (Title 1 of the International Claims Settlement Act of 1949) to claims "arising out of the nationalization or other taking of property" of U.S. nationals. This jurisdiction is narrower than that of the Tribunal which also includes claims arising out of debts and contract.

Section 6

Section 6 was added at the request of U.S. claimants to promote cooperation and coordination of U.S. positions before the Tribunal. It allows the Secretary of State to maintain the confidentiality of records pertaining to the arbitration of private claims before the Tribunal notwithstanding the provisions of the Freedom of Information Act. This section is not a secrecy provision. Rather, it is designed to ennance the effectiveness of the presentation of claims before the Tribunal. It allows the sharing of documents and information by and between the U.S. Government and the U.S. claimant community, while at the same time preventing their public release through the Freedom of Information Act.

I would note that significant documents generated by the Tribunal itself, including its awards, decisions and important orders, are now publicly available both from the Tribunal and the Department of State. We believe such openness is both healthy and useful, and have routinely been making available the pleadings and other submissions of the U.S. Government on matters

of importance to the claimants. The purpose of Section 6 is to enhance such coordination with respect to certain other kinds of information such as might be contained in a statement of claim filed by a private individual or corporation..

Section 3

Under the Algiers Accords, the two Governments agreed to share the expenses of the Tribunal and the Security Account equally with the result that the United States incurs significant expenses. It contributes $900,000 a year for the maintenance of the Security Account and a little over $2 million a year for the operations of the Tribunal. In addition, the State Department and other Government agencies spend about $1 million a year to provide assistance to U.S. claimants, for a total annual U.S. Government expenditure of about $4 million.

While the U.S. as a nation clearly benefitted from the Algiers Accords and the continuing peaceful resolution of U.S. and Iranian disputes, the bulk of the Government's expenditures are incurred in providing a special benefit to a clearly identified group of U.S. nationals -- those with private claims against the Government of Iran. As I have already noted, about 85 percent of the Tribunal's caseload is based on these private claims and much of the State Department's expenses relate to services provided private claimants. For those claimants whose claims are under $250,000 each, the Department prepares and presents to the Tribunal legal briefs on their behalf. To date, we have submitted over 62 Supplemental Statements of Claim,

containing more than 16,000 pages of text and evidence. We have also negotiated settlements which resulted in payments to ten small claimants.

To assist the large claimants, the Department monitors Tribunal activities, analyzes Iranian factual and legal arguments and prepares and presents U.S. positions on significant issues common to large numbers of claimants. The U.S. Agent and Deputy Agent in The Hague devote almost all of their time to private claimants. One of them is present at virtually every pre-hearing conference or hearing to assist the private attorneys. Equally important, prior to these conferences of hearings, the Agent or Deputy Agent brief private attorneys on procedural and substantive matters, advising on tactics and methods of presenting their claims. Their assistance, according to many private claimants, is invaluable.

We believe it is reasonable for successful claimants to bear the costs of the mechanism from which they benefit. Section 3 therefore authorizes the deduction of two percent from any payment made from the Security Account in satisfaction of an award of the Tribunal in favor of a U.S. national.

This provision is consistent with long-standing U.S. governmental policy of requiring payment for the provision of special benefits to specific classes of Americans. The adjudication of claims against foreign states has traditionally been a special benefit provided only to certain classes of people. Since 1952, the U.S. Government has generally deducted 5

percent from awards made by the Foreign Claims Settlement Commission to U.S. nationals in satisfaction of claims against foreign governments in order to recover the costs incurred by the Commission in adjudicating their claims. We recognize that there are differences between arbitrating claims before the Tribunal and before the Commission, but the differences do not negate the principle we are discussing. Like the Commission, the Tribunal and the Security Account were established to provide a special service to a special class of Americans.

There is no question that U.S. nationals have benefitted from the Tribunal and the Security Account. Of the 176 awards issued to date, 128 have resulted in payment to U.S. nationals within weeks, if not days, of the issuance of the Tribunal's award. The payments have been for the full amount of the award and, in at least 14 cases, the claimants received 100 percent or more of the amount claimed. The claimants did not have to go looking for assets to attach in satisfaction of their judgments nor did they have to worry about the proscriptions in the Foreign Sovereign Immunities Act, as they would have had to do in the absence of the Tribunal and the Security Account.

The "small claimants" (those with claims for less than $250,000 each) particularly benefit from the legislation. Not only does the it provide standby authority for adjudication by the Foreign Claims Settlement Commission (which I mentioned before), but it provides it at a fee significantly less than that customarily charged by the Commission under comparable

circumstances. Even in the absence of an en bloc settlement of the "small claims", these claimants benefit by the existence of the Tribunal as a forum for resolution of their claims and the availability of the Security Account for payment of their awards. The Committee should also note that, as provided by the Algiers Accords, the U.S. Government prepares and presents the claims of all small claimants before the Tribunal.

As you know, the Government has been deducting two percent of the amount awarded to each successful claimant from the Security Account since June 1982. The deductions are made pursuant to a Directive License issued by the Treasury Department under the Independent Offices Appropriation Act -- a general user fee statute. At the same time as the Treasury Department issued the Directive License, the Administration submitted the Iran Claims Act to Congress because we believed that Congress should decide on an appropriate fee structure.

In the absence of specific Congressional approval, the validity of the Directive License was challenged by one of the successful U.S. claimants in the United States Claims Court. In a recent oral ruling, Chief Judge Kozinski indicated that the Directive License was invalid on the grounds that it did not meet the requirements of the Independent Offices Appropriation Act and that he would order the Government to return the two percent collected from that particular claimant.

Judge Kozinski's ruling results in a potentially chaotic situation. First, the ruling calls into question the

Government's ability to continue collecting the two percent fee, even though the current litigation is for monetary damages, not an injunction against further collection of fees. Second, the litigation was brought by only one of the 121 U.S. nationals who have received awards from the Security Account to date and was not certified as a class action on behalf of the others. Thus, the United States will likely be faced with a barrage of suits from the remaining successful U.S. claimants, seeking to recover the two percent fee which was deducted from their awards. In fact, at least three suits were filed within a week of the oral ruling and a number of other claimants have indicated their intention of filing suit.

Action on the legislation is therefore particularly important at this time to rectify the situation and to preclude a loss of revenue. Since the establishment of the Tribunal and the Security Account, the Government has spent some $12 million; it will continue to expend about $4 million annually. Based on the Directive License, the Government has recovered $6.8 million. That amount represents only the U.S. share of the cost of maintaining the Security Account and about one-third of the U.S. contribution to the Tribunal's operating expenses to date.

The amount recovered to date clearly has not covered all U.S. Government expenditures. In part this reflects the fact that some of the Government expenses relate only to the prosecution or defense of the government to government claims and certain of the interpretive cases. The U.S. agencies involved considered a

number of methods of apportioning the Government's costs among claimants. We continue to believe that the flat two percent rate is, on the whole, most equitable and efficient.

We recognize, however, that there is serious disagreement with our position on the part of some claimants and we believe that the decision is one to be made by Congress. The two-tier approach proposed by Senator Evans in the revised legislation reflects a compromise which the Administration is prepared to accept. It will require a refund to the claimants of $2.4 million of the amount already collected and will reduce the amount ultimately recovered by about one-third. Nonetheless, the United States would be reimbursed for a substantial proportion of Tribunal-related expenses (although it is difficult to determine the exact amount since the size and distribution of future awards cannot be predicted with any certainty). Moreover, the proposal preserves the principle that claimants should bear their proportionate share of the expenses incurred in providing them with a forum and a source of funds to satisfy their claims against Iran.

I would like to add one technical point. The two-tier approach will require the Federal Reserve Bank of New York to calculate the amount to be deducted from awards. In the normal case, this will cause no difficulty, since the amount awarded to a specific claimant in a specific claim will be readily identifiable. Where, however, the Tribunal makes more than one award in one claim (for example, where it first renders a partial

award and subsequently renders a final award), the revised legislation would direct the Bank to aggregate those awards in calculating the deduction. If the Tribunal renders an award covering more than one claim without specifying the amount awarded in each claim, we would expect the Bank to claculate the fee based on the total amount awarded.

Conclusion

In sum, we think that prompt passage of the Iran Claims Act is essential. The legislation will allow the Government to more effectively represent the interests of U.S. nationals and will facilitate the adjudication of the small claims in the event of a lumpsum settlement with Iran. In addition, we believe that the legislation fairly allocates to the claimants the costs incurred by the Government in providing them with an effective forum for the resolution of their private financial disputes with Iran and access to a source of funds from which to satisfy their awards.

TRANSCRIPT OF PROCEEDINGS

IN THE UNITED STATES CLAIMS COURT

SPERRY CORP., et al,	)	
Plaintiff,	)	
v.	)	No. 660-82 C
THE UNITED STATES,	)	
Defendant.	)	

Pages 139 through 175

Washington, D. C.

May 1, 1985

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Bench Ruling by Judge Alex Kozinski
No. 660-82C May 1, 1985

THE COURT: Well, I think we've come to the end of the road.

Thank you, all for very, very fine arguments, and a very fine briefing in what is really a very complicated little case.

The most difficult issue, in my view, is the jurisdictional issue: the question of whether or not this case does or does not fall within the treaty exception, 28 U.S.C. Section 1502.

The Court takes little comfort from the fact that there was only one vote in Shanghai Power suggesting the treaty exception applied in that case.

The four other judges went to the merits, but that is because the lower court's opinion dealt with the merits. It is probably easier to review than getting into a whole new area.

So, I think the question is a close one. The case, it seems to me, falls squarely within, or rather, between the precedents. It is, on the one hand, not a situation exactly like Weld because, in Weld, there really was an espousal, a settlement and then an Act of Congress upon which the claimants could rely. They could point to the Act of Congress as their entitlement to the money

in question.

In Great Western and other cases cited by the defendant, there was really only the treaty, only the international agreement. The claim such as existed prior to that had been espoused by the United States had been extinguished.

So, whatever rights existed belonged to the United States; and, if rights belonged to anybody but the United States, one would have to look at the terms of the treaty and figure that out.

In this case, it is really hybrid, and neither of the lines of precedents really cover it.

On the one hand, we have a claim that grows out of a commercial claim, and it was originally filed in District Court here. There was a prejudgment attachment. It was a claim that one can loosely say, based on the common law -- although we know that one cannot sue foreign governments under the common law -- but under the Foreign Sovereign Immunities Act, suit was brought and was proceeding along.

Of course, we do not know what the outcome of the lawsuit has been. We do not know what, if any, jurisdictional questions might have existed. But, in any case, we know there was a claim; we know it was brought; we know it was presented to the Court; we know there was a prejudgment attachment.

So, we know that there was a commercial basis to the claim.

Now, what the Algiers Accords did to that claim is really somewhat unusual and very difficult to put into a proper legal pigeonhole. The Algiers Accords, defendant tells us, did not purport to take up the claim, did not purport to espouse the claim, did not purport to appropriate for the United States the claim.

As we all know, the Sovereign can do that. The Sovereign can take the claims of a private party, make them its own by espousing them, and then either pay or not pay, as it is deemed appropriate, the money over to the claimant, if, in fact, it recovers anything.

But the government has been very careful to say that that did not happen here, that the Algiers Accords provided a forum, provided a mechanism for satisfying the claims; and, therefore, the United States really is not the owner of the claims.

Whatever else is clear, I think Mr. Cohen has made it clear that the United States is not an owner of either the claims or the resulting judgments, except, of course, if there is a claim for the 2 percent itself.

The question, then, is the claim to what came out at the other end, which is the tribunal award, is that something that is based on the original common law, so

to speak, a claim, or commercial claims that existed before the Algiers Accords; or is it then, or is all of it substantially based upon the tribunal award and tribunal award being something that grows out of the treaty or the international agreement?

I think it is a closed question and, given that, the question is closed. One looks at the policies of the act to see whether or not assumption of jurisdiction in this case were going to follow what Congress had, the evil Congress sought to avoid in passing the exception. And I rely on defendant's assertion what those purposes are as they appear from the legislative history and from the cases.

The one was fear of this kind of claim involves large sums of money. Well, we've calculated it here, even under the most extreme circumstances. Well, they are not talking about very large sums of money; they are talking pretty big money.

But $50 million, $100 million is not the kind of claim that is so significant in light of other jurisdictions this Court has that one would say, "Gee, this is something that Congress would inherently have wanted to preserve for itself."

Even if one talks about the full amount of the possible awards made by the Iranian Claims Tribunal, which

up to now have been something on the order of $200-$300 million. It's really not an astounding amount of money. But we're not; we are talking only about 2 percent of that amount and even in the extreme circumstance that a billion or even two billion dollars of claims are paid out, the amount in question will not be that huge that this particular policy would be offended.

The second one policy that defense counselor has raised is that Congress wished to reserve power to act in these areas. But, of course, that is not a situation where Congress has acted, so I'm not quite sure which way that policy cuts, if it has any implication at all.

This situation where the executive has acted pursuant to standing Congressional authority, if indeed there was any authority at all for the fee, is the Independent Office Appropriation Act, which is a statute having nothing to do with either foreign relations or peculiarly with this fact situation.

So, if we have a situation where Congressional exercise of power were in question, this policy would be implicated, but it's not like the situation where the United States espouses a claim, gets a lump-sum settlement, and then Congress has to think about what are we doing to do with the money -- "How should we allocate this?" -- as they have done frequently in the past.

Congress hasn't acted and doesn't appear to be interested in acting. We were talking about an exercise of executive authority, so really the powers of Congress are not seriously implicated.

The most important consideration is: Will this interfere with our foreign relations?

This is a clear policy of this statute that the defendant's counsel has suggested, that exercise of the Court's authority in this area might somehow cause deception in our foreign relations, might embarrass the President, or our government or negotiators, or the Department of State.

These are serious types of concerns. They are not to be lightly disregarded, and the Court has in other opinions given significant deference to these concerns -- in one case, too much deference; and in another case, the Court of Appeals seems to have thought that too much deference or too much concern was expressed on that score.

But even exercising the same kind of concern in this case, it is very difficult to find the point of the policy implications of a jurisdictional ruling or a ruling on the merits in this case.

There is no need to interpret the treaty or rather the Algiers Accords. The terms of the Algiers Accords have never been in dispute, have never been an issue in

the case. The plaintiffs are not seeking to second guess the awards process. They are not seeking to invalidate the tribunal or the awards process. They are not seeking to, in any way, undermine anything that happened on the other side of the ocean.

What they are concerned with is deduction of a fee that happened once the money got to the United States in the hands of federal agencies. The New York Fed might not be an agency for some purposes, but it was an agent of the United States when it received the money because, as we have learned, it is only a central bank that can receive funds from another central bank.

The deduction occurred on this side of the ocean, and the issue presented is really a relatively narrow one, one that the Court deals with all the time.

Is the fee appropriate under a federal statute, the Independent Office Appropriation Act? And a subsidiary issue: Were any applicable procedural requirements followed, presumably the APA, Administrative Procedure Act?

Those are the kinds of issues that this Court deals with on a regular basis, that other Courts deal with on a regular basis, and that would cause significantly less -- in this Court -- embarrassment, the possibility of embarrassment, the possibility of entanglement in our foreign relations, and could possibly have happened in

th Langenneger case, which, once again, the Court of Appeals felt again there was too much deference off of their process.

This is a much weaker case for an argument of actual entanglement in the Court in foreign relations. The questions are statutory, procedural, run-of-the-mill, everyday questions of statutory and regulatory law.

Although the question is not free from doubt, the Court assumes jurisdiction and goes on to the merits of the claim.

A number of arguments have been raised, and the issues, I think, have been presented fairly squarely. If the United States is entitled to promulgate or entitled to, was entitled to and properly did promulgate the fee under the Independent Office Appropriation Act, then it is entitled to keep the money and the plaintiff loses.

If the United States maintained the fee without statutory authority authorization, either because it did not follow the statute or did not follow the procedural requirements or, in some other way, the processes are otherwise defective, the plaintiff wins and gets to take its money, unless an argument of laches or some sort of equitable doctrine like that were to prevail. I don't see any disagreement; those are the issues.

And, so, we have to turn to the Independent Office Appropriation Act, and one examines the Act, and one examines

the precedents and examines what happened in this case, and a number of problems present themselves.

The first one is that it is quite clear that the IOAA calls for promulgations of fee schedules by regulation, and "by regulation" has been understood and interpreted to mean "by regulations promulgated in accordance with the Administrative Procedure Act."

I do not think there was any doubt on that point, and I am not quite sure whether this was conceded in this case. It certainly was conceded in Bunge, and I do not think there is any doubt on that point.

The question was whether or not the fee schedule here in question was promulgated by APA and, of course, there were no notice and comment procedures followed. The record discloses that Treasury officials really did not think this was a regulation at all. This was something to kind of publish, as a courtesy.

Some concern is expressed that claimants would resist this, and so why put something out for comment when you know you are going to get bad comments back and people are going to object. Of course, that is the purpose of the notice and comment procedures of the Administrative Procedure Act, and whether one thinks that is good law or bad law, it does not matter; it is the law.

And fear that one would get bad comments is not

a good reason not to follow the law.

Now, it is absolutely clear on this record that, at least on the record as presented, that no thought was given at the time to the foreign relations exception which has now been raised by the government.

How do we know that? Well, we have a memorandum, the June 4 memorandum, which is Exhibit Number 16 of plaintiff's appendix, and it says:

"This is not a regulation. We don't have to publish it."

So, what does it say? Well, we decided it was not a regulation, and we did not have to publish it for that reason, but, at the same time, there was talk about the foreign policy implcations and here is really the reason why we did not do it.

Nevertheless, we have an explanation from somebody who was apparently in a position to know, and reasons have been given by Mr. Michael as to why the APA exception was, in fact, applicable and why it was not appropriate to have published it and the foreign policy implications such a publication would have had.

The Court accepts that. I think that although there is a great deal of skepticism that can be expressed about what actually happened on the record, this is a particular exception that ought to be more generously applied

by the Courts, and that if, in fact, the Court is persuaded, even looking back with some hindsight, that the concerns expressed are reasonable, that they are the kinds of concerns that could properly have been invoked, but not publications of any sort. The Court is inclined to accept them and expresses skepticism as to whether that was, in fact, what happened but nevertheless continuing on down this path of allowing great leeway to the Executive Branch when it gets embarrassed with foreign relations, the Court is willing to say, it is close during skepticism, but it is probably just good enough.

So, we will go on from there. The Court rules that the failure to comply with the APA notice and comment procedures was appropriate because, in effect, an exception was, in fact, available; but it is aware of other cases that have stated you have to give your reasons right in the publication; you have to give them contemporaneously and whatnot.

The Court will not be that strict. We will accept the comments as given. They seem reasonable, and if that were the only problem, then a fee schedule ought to be approved.

Unfortunately, there are much more serious substantive problems with the fee schedule, and it is difficult to put one's finger on what the worst problem

is, and not casting aspersions on anybody, there seems to have been less than the appropriate amount of consideration given to the IOAA, its legal requirements, and the responsibilities of the government in promulgating or in issuing this type of fee schedule.

The Court is aware of the fact that there might have been time pressures, but we are not talking about war; we are not talking about national disaster; we are talking about the question of whether the United States could have held on if it chose to do that, to people's awards for six weeks, three months, six months, at the most, while it saw through the process and came up with a lawful course of action.

There might have been some problems with that. It may be that some claimants would have not liked that, the early claimants, but nothing has been raised that really suggests that this was a real national emergency, that one had to act or else lives would be lost or property would be damaged or whatnot.

This is a convenience. They wanted their money. Nobody thought about it, and such lawyering as appears on the record is thin, very thin; and the result is that the fee that has come up with does not even meet the basic requirements of the statute.

For one thing, the statute talks about fees being

charged by an agency on an agency-by-agency basis. I think one can twist the language and turn the language to get something else out of it, but I think that a plain English reading of simple words can lead only to the conclusion that the agency may promulgate a fee for services that it provides.

Here is the language:

"It is the sense of Congress that each service or thing of value provided by an agency" -- skipping the parenthetical -- " to a person, to an agency purported to be self-sustaining to the extent possible."

And then it says:

"The head of each agency may proscribe regulations establishing the charge for service or thing of value provided by the agency."

Now, we can get into questions of what it means to provide a service by an agency, and the Court is inclined to say that if an agency pays for something out of its own budget, it is a service or thing of value provided by the agency.

For example, if Treasury paid out of its appropriation for the NV Settlement Fund or for the operation of the tribunal, or whatnot -- and, again, I assume that the information given is correct; there has been no challenge to it. I assume that much of those things are paid out

of the Treasury account. Then, there are things of value that arguably are provided by the agency. It does not have to be agency employees who are providing it. If the agency pays for it, and it comes out of the agency's appropriations, fine. That's a benefit provided by the agency.

But an agency cannot charge fees for some benefit or service or thing of value provided by another agency, and no amount of twisting of the language of the statute will reach that result.

So, insofar as the fee schedule purported to charge the plaintiffs or anybody else for fees that were not expended for services that were not paid for by Treasury appropriation, either by payment of the salaries of Treasury employees, by payment directly out of Treasury funds, or by payment of fees of the tribunal or whatnot, the fee is invalid because it has concluded in its calculation amounts which are not properly chargeable in a fee schedule issued by the Secretary of the Treasury.

It is highly possible that the Secretary of State could issue a separate fee schedule. The Attorney General, if he feels that the Department of Justice is providing services, it is conceivable that he could provide a separate fee schedule as well.

And there is one thing that is clear is that

head of each agency may proscribe fee schedules for benefits provided by their agency; and the fee insofar as in promulgating a fee, the Secretary of the Treasury took into account services provided by other federal agencies, such as the Department of State and the Department of Justice, it is defective. It is a charge for things that they could not properly charge.

Now, we have in the appendix of Exhibit Number 15 a June third memorandum which seems to indicate that among the services charged for are Department of State activity and Department of Justice activity.

But we have something better than that. We have a brief from the defendant in this case detailing all the great things that the government did, and continues to do for these claimants and listed in -- this is the original brief -- all the statements about how State Department officials are doing all these fine and wonderful things and the Department of Justice officials are doing these things.

It is quite clear that the Department of the Treasury did take these types of service into account, services provided by other federal agencies and to that extent the fee schedule is invalid.

Moving on to the even more serious problems of the fee schedule, it has to do with the manner in which

a fee schedule must be promulgated -- and, again, putting to one side the notice and comment requirements of APA, which have been dealt with before.

But what kind of process must an agency go through in promulgating a fee schedule?

What is the kind of thought it must give? What is the kind of documentation it must provide?

What is the system of fact-finding and allocation and calculation that an agency must engage in, in adopting a proper fee scheule under the IOAA?

Now, it is a little bit of an odd question because we have never really seen a case like this before.

In the Bunge case, which we saw, we have what looked like a continued -- which, again, was not an IOAA case but was close.

What we had was a continuing attempt to make the fees fit the services. Well, it was not a very good job; it was kind of sloppy. It got kind of a slow start, and they were not very good at it.

But they were trying. They had their eye on the ball, and they tried to do the best they could. We had all those D.C. Circuit cases which the Court has expressed some skepticism over, and they were reversed, or perhaps this Court would have issued a different result.

But what is significant about the case is that

the agency had actually spent a considerable amount of time trying to make an allocation. It turned out not to be good enough for the D.C. Circuit, but it was something.

What we have here is nothing -- absolutely nothing. And defendant who is in the best position to come forward with something, if there were, has come up with nothing. What we have is a memorandum dated June 3, 1982, detailing the assumptions that were made on how to charge the fee, or, rather, an assumption as to what the costs would be included.

From that we know, of course, that certain services were charged for which could not properly be charged for. But there is nothing to support this memorandum, nothing to suggest why the estimates, the basis for the estimate -- it says, for example: "Total awards in excess of $4 billion."

One is baffled, looking at that figure, to know why Leonard E. Santos thought $4 billion rather than $3.5 billion, or $7 billion, or $2 billion, or $1 billion was the appropriate figure.

If one stops to think about it, the escrow account itself was a billion dollars. Presumably, the United States would have negotiated these accords, or thought about what an appropriate escrow account would be, in light of the likely claims.

How one gets to $4 billion? One does not know.

Ten-year life for the the tribunal security account? No indication whatsoever what that estimate was based on. Was it a guess? Was it a model? Was it a figure picked out of the air? Was it as far forward as this particular government official could predict?

It just baffles one as to what lies behind these assumptions.

"Annual cost of approximately $8 million." I assume there was some basis for these figures, but it is difficult to tell.

For example, there is an allocation for $.7 million -- $700,000, $.7 million -- for "miscellaneous direct and indirect costs -- Treasury, Justice, and State."

But, ultimately, there was something behind this memorandum that these are not the musings of one official. It may be the calculations; it maybe got published; it may be there are facts; it may be that there is talk of documentation, but all we're told is we are in a big hurry, and we really did not have time to think about it. It does not lead one to believe that, in fact, there is much substance behind this. If there had been, the Court is confident that the defendant would have come up with it, either by way of documentation or by way of affidavits.

If there was a meeting and nothing was committed to paper, if there were various documents that had to be

pulled together, if it was done in some fashion other than normal government memorandum process, surely finding this kind of data involved more than a single individual. It must have involved -- or should have involved, or ought to have involved -- dozens of people pulling information, estimates, and the like from all quarters of the government.

I cannot believe that we do not have a stack of affidavits a foot high detailing the thought process that went into making these assumptions. They may be valid, but all the Court can tell is that it is just a guess.

Now, the reason this all matters is because the Court has to review these things to see whether the agency, in fact, thought about the right things.

The Court is being asked by the government to say: "Well, they did the best they could. They were under pressure, and, golly gee, you know, it was a tough time, and they did the best they could."

And under those circumstances, the Court ought to defer.

The Court is not for deferring. The Court deferred in Bunge, in what was a terribly sloppy process, but there was an effort; it was a process; there were people out there thinking about it, and they were doing their best.

When the Court is convinced that people are doing their best, it is likely to step back and say: "Who knows?

Maybe they were under pressure; maybe they were involved in, maybe these are very difficult things to document or verify, or whatnot, but here was an attempt. Here is what they did to meet the statutory standards and come up with a conclusion and the Court will defer."

There is nothing to defer to in this case. There is nothing to defer to. And this is just talking about the easy part of the equation, and that is the cost side of the equation. There should not have been any difficulty at all in finding some reasonably substantial documentation for all of this.

Now, the other part of the equation -- that is when one gets into probably the most serious difficulties of this fee schedule, is the allocation of the fees to the class of claimants, or the class of those who have made claims before the tribunal.

And here there is not an exaggeration but a plain statement of fact, to say there is zero, nothing in the record to suggest any thought as to what the benefits were that were being conferred upon the people who are going to be charged the fee, and no thought at all in relating those benefits to the costs incurred by the government, and somehow coming up with a fee that reasonably attempted to match benefits and costs.

It is all the Court can tell from every indication

that the record discloses, Treasury officials looked at the pattern of the past and said:

"Well, Congress used to charge 5 percent on fees. We will charge -- we will use the same kind of formula, but we will use 2 percent of an award in the past in foreign, let's say, claims awards."

The award is paid out, and then Congress authorized the 5 percent fee.

Of course, the 5 percent fee authorized by Congress is a tax. That is what it all is. Congress has decided that it is really not a fee at all. What it is is a tax. Congress said: "We will deduct 5 percent from your award."

Congress can do that. As Justice Douglas recognized in NCTA, Congress can decide to subsidize some and to charge more to others. It can decide to relay costs to benefits, or can decide to ignore them.

An agency of the Executive Branch simply does not have that authority. And, insofar as the model that was being followed was the Congressional model of imposing a 5 percent fee, a flat fee, it was a cross model. It is a model that had no applicability to the situation.

They were following a practice of a body that had authorities that an agency of the Executive Branch does not have.

The difficulties with a fee system are manifold,

and the Court will only mention a few of them. For one thing, all the fees are allocated, or all of the costs, all of the benefits are allocated to only a portion of the claims.

Now, the Court is not saying that government could not subsidize some claimants and decide not to subsidize others.

But what an agency cannot do under the IOAA is to take all the expenses of a project and then charge only part of the recipients of the benefit.

Congress could, if it wished to, separate out a class of beneficiaries, separate out the costs attributable to providing them the benefit, and then allocate costs among the remaining beneficiaries and say, "Well, the government is going to pick up the tab for the rest of it."

And looking back at the June 3, 1982, memorandum, it is quite clear that in determining what the costs were and what the benefits were. All of the costs of running the tribunal were allocated to determining the fee schedule, the 2 percent fee.

There is, of course, a very large class of claimants who gets no benefits -- who gets a substantial benefit but pays nothing at all and calls themselves "losers." Losers, just like winners, profit from the existence of

a tribunal. It may very well be that there are losers who go through weeks of trial, taking up the time of the tribunal, the rent of the building, presumably imposing various costs upon our own government's lawyers who have got to monitor the process, extend the life of the tribunal so that the United States has to incur continuing expenses in running it, and accomplish nothing or very little.

They are charged nothing, or very little by way of fees, whereas claimants who settle or who get an award through litigation get charged on a percentage basis, covering presumably the entire cost of running a tribunal.

The other difficulty, one of the difficulties, apparently, is a class of benefits that is provided by the United States that did not accrue to this plaintiff at all and may not accrue to many of the claimants of the tribunal.

Another service is provided by State Department attorneys who actually represent, the Court understands, interests of small claimants before the tribunal.

Now, here is another situation of a shared benefit where all the costs are allocated to one party. Here is a case of no benefit being conferred on one group of people and yet being charged for providing them benefits -- no justification whatsoever under the IOAA for charging claimants who have their own attorneys and are represented by their

own attorneys at the tribunal for providing lawyer services for other claimants.

I heard the defense counsel's suggestion to the contrary, and I do not think there is anything there, simply insofar as the Department of the Treasury is purporting to charge the plaintiff here for services provided by State Department employees in representing other claimants, it is exercising a legislative function, taking from the poor, giving to the rich.

It may be O.K. for Congress to do it; it is not O.K. for the Department of the Treasury under the Independent Office Appropriation Act.

Finally, it is difficult to list these problems in order of their severity.

The percentage fee itself is a suspect mechanism because regardless of allocations which we have talked about, whether the amounts loaded into the costs are appropriate amounts to be loaded in, assuming those are correct, assuming that everybody gets charges across-the-board, losers and winners, a fee that varies with the amount of the award does not on an a priori basis have a rational relationship to the benefits that are likely to have been derived by the claimant.

Now, the Court is not saying that a case could not be made for that kind of relationship, that a case

could not be made on the facts for establishing such a relationship. It could be shown, for example, that a billion dollar claim, or a $50 million claim imposes proportionately greater costs upon the tribunal process than does a million claim or a $50,000 claim. It is possible, just not beyond the realm of possibility.

No factual showing like that has been made in this case, and it is moreover the kind of relationship that is counter-intuitive, and does not immediately jump to mind.

Litigating a million-dollar claim does not, in the Court's experience, necessarily entail more or proportionately more, or, let's say, ten times more, costs than litigating a $100,000 claim. There might be a relationship there, but, again, there might not. There are many claims involving large sums of money that get resolved on summary judgment or that get settled, or that involve little or no burdens on the process; and then there are those $50,000 claims that live with us forever.

And, again, the Court does not mean to suggest that under a proper set of circumstances a relationship of that Court could not be shown, or some relationship could not be shown where a graduated fee, where some claimants get charged more than others, could not be justified. But it has to be justified; and the fee, as it is here instituted,

particularly with respect to this plaintiff, seems to bear no relationship at all to actual costs that have been imposed upon the process, on the one hand, or the benefit derived from the process, on the other.

And nothing has been presented by the defendant to suggest that such a relationship exists or such a relationship could be established.

Now, once again, one has to step back and try to determine what the Court's function is and what is the appropriate allocation of functions between the Court and the agencies of the Executive Branch.

The Court in this case is operating really in a vacuum. Much of what has been advanced to support the fee in this case are conjectures, to some extent, after the fact, suppositions of what could have done and what might have been done.

There has also been a suggestion that, "Oh, this is the best that could have been done. I mean, we really did the best we could under the circumstances."

But this is patently not the case. Agencies can do better, and agencies have done better.

There was not so much, as the record discloses, as a detailed examination of what the precedents in the 10AA area call for, even the discredited D.C. Circuit, which, after all, is a place where such regulations can

be challenged.

Nothing suggests that Treasury officials thought about the process, considered the responsibilities under the process, considered the limitations, considered the severe constitutional question: the question of whether or not an agency of the Executive Branch can act as if it were a committee of a House of Congress.

Now, the Court recognizes there are difficulties in the process. The Court recognizes that the process cannot all be perfect, that reasonable relationships are subject to reason.

What is the reasonable relationship between one thing and another is something that reasonable people can differ over.

But the Court has to have some sense that the process was, in fact, engaged in, that the agency recognizes resonsibility under the Act and did its best under the circumstances.

The Court is not persuaded that that is the case. In this record, it simply appears that everybody was in a rush to get on with the process, that there was some pressure from claimants to release the settlements quickly.

A memorandum was written citing two Supreme Court opinions, without citation, without analysis, and simply stating: "Of course, we have lots of power to do this,"

pointing to what is a false light of the Congressional practice of allocating a fee on the basis of the award made, and then everybody got on merrily with saying this is not a regulation at all, we don't need to publish it; and then going ahead and deducting the fee.

The Court cannot criticize the way in which -- will not criticize the way in which Executive Branch officials perform their business. They have lots of things to do; this is obviously a matter of some concern, and that was some that needed to be handled quickly.

All the Court can say, or can look at, is whether or not the Executive Branch or the agency in question has, in fact, done its job -- has, in fact done that which the Court can defer to, and say: "The Court will not step into this area because those charged by law with implementing the statute have done their job."

This is not such a case, and it just seems absolutely clear that the nuances, the difficult issues of the Independent Office Appropriation Act were not considered, did not attract anybody's attention. It is the kind of fact-finding and sensitive weighing and balancing to stay within the Supreme Court's directives, to say nothing about the D.C. Circuit directives -- just simply did not take place.

For that reason, the fee is invalid; and that

is the end of the matter.

Now, the defendant has suggested that there might have been laches involved, somewhat like in the Bunge case. It is kind of a belated claim, but it was raised belatedly in Bunge too.

Bunge was a different case, however. In Bunge, there were actual benefits that had gone back to the claimants themselves, or rather the class of people for whom the claimants were a part, which meant that the fund that claimants said was improperly collected had been depleted, and had been depleted to benefit the very class of the plaintiffs in that case.

Moreover, the plaintiffs in that case were in this business and were engaged in paying these fees and dealing with FGIS -- Federal Grants Inspection Service -- on this issue on a continuing basis from the date the regulations were promulgated, or rather were not promulgated on the day that the fee schedules went into effect, even before that.

In this case, as far as this particular plaintiff is concerned, they, of course, were in the process; they were in the claims process, but no doubt they were busy in Iran not knowing whether or not they were going to get anything for their money, and they were busy negotiating that.

The earliest date really the Court can charge these plaintiffs with having responsibility to do something would have been September 14, the date of the award. Before that, they did not know whether, in fact, they would get an award, the size of the award, what interest they would have.

Now, if this would have been six years later, it would have been different. We are really only talking about the difference between June and September -- four months, six months, or something of that sort. I am not sure that, in any case, this would be a long enough period for a claim of laches to have matured.

But, in any case, no later than October 1, these claimants or these plaintiffs brought their claims to the attention of Treasury officials, and, frankly, until this day it has been carefully ignored. It is not as if the government said: "Gee, you know, as soon as we found out our mistake, potential mistake, a possible problem, we went out, and we did it right. Look at them, they did not let us know earlier on their part."

The case has been -- it is now almost three years, certainly more than two-and-a-half years that Treasury officials should have known of their error and any objective analysis of the law should have allowed them to predict the Court's substantive result.

Of course, defendant does have a pretty good jurisdictional argument, and that alone, of course, would be a reason not to give up on this particular case.

But one just talks about trying to do the right thing, or the claim being -- "Well, we didn't know we had a problem until it was brought to our attention" -- surely, when the claim was brought to defendant's attention, even though they were inclined to fix the problem, they had every opportunity between October 1, 1982, and this date to do so.

Counsel for the government represents that this has not been done. It is a little difficult to really give much credence to the claim of laches, both because of the shortness of the time period, the time in which claimant's claim arose and defendant's failure to really move very quickly once they did find out there was a problem.

So, the Court rules that it had jurisdiction, that Independent Office Appropriation Act applies, that the Treasury to directive license failed to comply with the Independent Office Appropriation Act, and for that reason the fee is not valid.

The defendant has suggested that if there is the result the Court finally comes to, that the appropriate methodology is to order a remand rather than a judgment for the plaintiff. The Court is not going to take that

approach.

The question in this Court, unlike the district courts -- the question in this Court is not the propriety of the agency's procedure in and of itself. The question is: Did the government grant the money under appropriate authority?

And, if the Court is convinced that the government did not take the money under lawful authority, it cannot very well allow the Government to keep it, even for a minute.

So, having found that there was no authority to keep the 2 percent, the Court is constrained to enter a judgment ordering or rather calling for the repayment.

I want to be careful to -- that everybody understand my ruling.

There is nothing about what the Court has said today that speaks to what the effect, if any, would be of a properly promulgated fee, if a fee is properly promulgated and issued, vis-a-vis futher or past claimants before the tribunal.

That issued was not raised, and the Court expresses no view as to whether the defendant can go back, come up with a proper fee schedule, impose it from that point forward, or you can go backways and impose it upon this claimant or other claimants.

That question is not being adjudicated today,

and has not been briefed, and frankly, I have no idea what the answer to that question is. I certainly do not express the view that something ought to be done, or ought not to be done.

I am simply making clear that the Court's ruling today is that retaining the fee pursuant to directive licensing at the time when it was retained was unlawful because the directive license was unlawful, and the money now has to be returned.

Future cases will take care of themselves, of course.

That's it.

Anything else I can do or say?

Want to settle?

MR. SEIVER: I don't think there is anything else I have. The motion for class certification, I believe, is still pending. We did not argue or address that today.

THE COURT: Yes. Well, I am inclined to deny that motion. I think that this probably takes care of the case.

I am inclined to write an opinion in this case, but I could be talked out of it. I have also got a bunch of other things that come ahead, and I know the plaintiff wants his money badly.

So, do you have a view on the question of my

opinion?

MR. SEIVER: Your Honor, we would prefer an opinion. I would understand, though, the judgment which was rendered today from the Bench would be properly appealable as a final Order of the Court, and the reasoning which the Court has given would be sufficient.

So as not to delay any expected appeal by the government, we would think that the Court could certify it now, that this is the judgment and that the opinion would follow and perhaps the Federal Circuit would not want to take an appeal at this time.

We would prefer an opinion, though, whether or not it holds up the appeal process or not.

THE COURT: O.K.

Mr. Cohen, what's your view?

MR. COHEN: Well, I'd like to consult with my client, Your Honor.

THE COURT: Maybe we could all come back in a week or two; you tell me you have all settled and the case has gone away.

Order a transcript, and read it to your client.

MR. COHEN: Yes, I think it's --

THE COURT: I mean you are going to spend another year on appeals, and whatnot, and probably wind up in the same place and be more money behind.

How about this? Why don't you all come back in a week or two, and maybe there is some way of resolving this case. You have my ruling. I will stick by it.

I am inclined to write an opinion, but I would like to hear what you say, Mr. Cohen. If I write an opinion, I am not inclined to send the judgment out and then follow it up. I will hold on to the case until I write it.

What do you thing?

MR. SEIVER: I think that would be fine, Your Honor, and, as long as -- maybe I should direct this to the Court Reporter, about obtaining a transcript as quickly as possible.

THE COURT: Anybody can buy a transcript. Just take it up with the Reporter.

MR. SEIVER: O.K.

THE COURT: I mean, any litigant can.

All right, shall we make it two weeks?

MR. COHEN: That would be fine with me, Your Honor.

THE COURT: I have heard it all now. It is not final until the Supreme Court denies the hearing for what it is worth.

MR. SEIVER: May 15, Your Honor?

(Pause)

THE COURT: How about the 14th, at 10 o'clock? It is a Tuesday. I am going to be in here for something else anyway. I would like to hear how you are doing. Just a brief get-together, O.K.?

MR. SEIVER: That is fine.

MR. COHEN: Fine.

THE COURT: Again, a very excellent job on both sides, both arguing and briefing and the like.

It's always a great pleasure for me to see a good advocacy.

MR. SEIVER: Thank you.

MR. COHEN: Thank you.

(Whereupon, at 2:06 p.m., the hearing was adjourned.)

Senator EVANS. Thank you very much, Mr. Matheson.

If we had not created a Tribunal which was the result of the political settlement we had to free the hostages, private claimants presumably could have pursued their claims through the Federal courts, incurring minimal fees in pursuit of their claims. What is the rationale for the Government proposing to subtract fees from these awards made by the Tribunal rather than the alternative which might have been available to the citizens through the regular Federal court system?

Mr. MATHESON. Let me try to answer your question in two ways. First of all, it is certainly true that the Algiers Accords were in a sense a political settlement designed to free the hostages, which of course was an overriding U.S. foreign policy goal at the time; but we are not trying to charge the private U.S. claimants for all of the expenses which were necessary to achieve the Algiers Accords, including a great deal of diplomatic and military expense. Rather, we are only asking them to share in the cost of those specific parts of the Algiers Accords which particularly benefit them as a class: specifically, the Security Account and the Tribunal.

Second, it certainly is true that in the absence of the Algiers Accords private U.S. claimants might have tried to protect their interests in U.S. courts by instituting litigation against Iran or various entities associated with Iran. We think, however, that they would have faced very substantial difficulties in this course of action.

First of all, they would have had to find and achieve control over a sufficient amount of Iranian assets to satisfy their claims. They would have had to overcome various special types of immunities that many of those assets had, such as diplomatic immunities or the immunity of the monetary reserves. They would have had to deal with a number of Iranian Government defenses, such as the defense of sovereign immunity; and in all, this would have been a very long and costly process.

By comparison, the Tribunal provides a relatively simple mechanism, potentially with unlimited recovery for legitimate claims, and a secure source of payment of claims in a prompt fashion. I do not doubt that there were private U.S. claimants who could have protected their interests in the absence of the Accords, but I must say that as a whole I think the American claimant community does benefit by the remedies which are provided under the accords, and that is particularly true with respect to those parts of the claimant community such as the small claimants, which have limited financial resources or financial incentives.

Senator EVANS. Would you care to speculate on what the prospects for recovery might have been if people had been required to pursue it through the regular Federal courts rather than through this Tribunal, if we had not had the Algiers Accords for instance?

Mr. MATHESON. It is very difficult to say, and it has been a matter much discussed by lawyers from the date of the Algiers Accords to the present. Those defenses which I have described would have been pursued vigorously by the Iranian Government. From all we have seen of their actions since, they would have hired competent counsel in the United States and spent a great deal of money to do it.

Again, my rough judgment—and it can only be that—is that there would have been U.S. claimants who could have protected their interests; but I think that as a whole the American claimant community benefits more from the Tribunal and Security Account process.

Senator EVANS. You mentioned in terms of the fees the Foreign Claims Settlement Commission. Would that have been an alternative route if we had not had the Algiers Accords?

Mr. MATHESON. Well, this would have required the Foreign Claims Settlement Commission to handle the entire huge volume of American claims. American large claimants, as I understand it, have much preferred to have their claims adjudicated by the Tribunal than to have them adjudicated by the Foreign Claims Settlement Commission, which is the reason why we have focused on the small claims as a group which would be suitable for that purpose.

Senator EVANS. But I do understand correctly, do I not, that similar claims American nationals may have against foreign countries have been settled by the Foreign Claims Settlement Commission, and that for more than 30 years a considerably larger fee than is now being suggested has been taken from those settlements? Is that correct?

Mr. MATHESON. That is exactly correct. And if it were not for the change in the fee which would be brought about by this legislation, the small claimants would have to pay 5 percent if they went to the Foreign Claims Settlement Commission under some other statutory authority.

My understanding is that the large claimants prefer the Tribunal to the Foreign Claims Settlement Commission if only because they have potentially unlimited ability to recover the full value of their legitimate claims, which has not always been the case in past lump-sum settlement claim arrangements.

Senator EVANS. Are you aware of any proposal which has been made, at least in recent years, to legislatively remove the fee from the Foreign Claims Settlement Commission?

Mr. MATHESON. I am not personally aware of that.

Senator EVANS. About 100 claims apparently involve only the governments of the two countries. How does the work involved on behalf of the private claimants differ from that which has to be done on behalf of the U.S. Government's claims? Perhaps you could detail a little bit the services performed by the State Department on behalf of the various categories of clients, including the U.S. Government.

Mr. MATHESON. Certainly. I should mention, to start with, that the figure of 100 claims probably includes the major interpretative disputes, as they are called, which are conducted by the two governments, but which in fact effect and substantially benefit general private claimant interests because they decide issues of general applicability to them.

In terms of the kinds of services we perform, with respect to small claimants we prepare the claim, we present the claim to the Tribunal through all its proceedings, and we handle the entire job before the Tribunal for them. This is very much like we would do for our own Government claims, except of course that the Govern-

ment claims are substantially different in character and very much larger in amount—but the role is similar.

With respect to the large claimants, they are represented in the Tribunal by their own attorneys, but we do provide a variety of different kinds of assistance to them. We exchange information in the American claimant community. We counsel the attorneys of the private large claimants. We attend all the hearings and prehearings, and where it is appropriate we offer U.S. Government views on common issues, including the preparation and submission of briefs on very important issues that are common to private claimants.

We spend a lot of time and energy to encourage the Tribunal and its chambers to act expeditiously, to schedule cases promptly, and to act fairly. We have a staff in the Hague which assists claimants, and a staff here in Washington that does the same.

Senator EVANS. Could you detail for us under what statutory authority and under what procedures you will refund the payments to those who have been assessed the 2 percent fee, to how many full repayments are authorized, and to what degree the passage of legislation we now have in front of us would affect those cases which are now pending?

Mr. MATHESON. The Treasury Department has assured us that it has statutory authority to make the refunds upon passage of this act. It would be able to do so under a permanent appropriation provision contained in title 31 of the United States Code. The section number is 1322(b)(2). It is a permanent appropriation that is specifically designed for the refund of amounts erroneously received.

We would be glad, if you wish, to submit for the record both a copy of this provision and a summary of past GAO decisions which specifically confirm that that authority is available for exactly this kind of purpose.

Senator EVANS. I think it would be only necessary to make perhaps a reference to the case, and then the GAO opinions would be useful to have.

Mr. MATHESON. Fine.

[The information referred to follows:]

§ 1322. Payments of unclaimed trust fund amounts and refund of amounts erroneously deposited

(a) On September 30 of each year, the Secretary of the Treasury shall transfer to the Treasury trust fund receipt account "Unclaimed Moneys of Individuals Whose Whereabouts are Unknown" that part of the balance of a trust fund account named in section 1321(a)(1)–(82) of this title or an analogous trust fund established under section 1321(b) of this title that has been in the fund for more than one year and represents money belonging to individuals whose whereabouts are unknown. Subsequent claims to the transferred funds shall be paid from the account "Unclaimed Moneys of Individuals Whose Whereabouts are Unknown."

(b) Except as provided in subsection (c) of this section, necessary amounts are appropriated to the Secretary of the Treasury to make payments from—

(1) the Treasury trust fund receipt account "Unclaimed Moneys of Individuals Whose Whereabouts are Unknown"; and

(2) the United States Government account "Refund of Moneys Erroneously Received and Covered" and other collections erroneously deposited that are not properly chargeable to another appropriation.

(c)(1) The Secretary of the Treasury shall hold in perpetuity in the Treasury trust fund receipt account "Unclaimed Moneys of Individuals Whose Whereabouts are Unknown" the balance remaining after the final distribution of unclaimed Postal Savings System deposits under section 1(a) of the Act of August 13, 1971 (Public Law 92–117, 85 Stat. 337). The Secretary shall use the balance to pay claims for Postal Savings System deposits without regard to the State law or the law of other jurisdictions of deposit about the disposition of unclaimed or abandoned property.

(2) Necessary amounts may be appropriated without fiscal year limitation to the trust fund receipt account to pay claims for deposits when the balance in the account is not sufficient to pay the claims because of payments made under paragraph (1) of this subsection.

(Pub.L. 97–258, Sept. 13, 1982, 96 Stat. 922.)

Historical and Revision Notes

Revised Section	Source (U.S. Code)	Source (Statutes at Large)
1322(a)	31:725s(a) (last sentence last proviso)	June 26, 1934, ch. 756, § 20(a) (last sentence last proviso), 48 Stat. 1233; Apr. 21, 1976, Pub.L. 94–273, § 2(16), 90 Stat. 375.
1322(b)	31:725p–1	June 30, 1949, ch. 286, § 101 (par. under heading "Payments of Unclaimed Moneys"), 63 Stat. 359.
1322(b) (Cont'd)	31:725q–1	June 30, 1949, ch. 286, § 101 (par. under heading "Refund of Moneys Erroneously Received and Covered"), 63 Stat. 358.
1322(c)	31:725p (note)	Aug. 13, 1971, Pub.L. 92–117, 85 Stat. 337.

Explanatory Notes

In subsection (a), the words "directed to be established in section 725p of this title" are omitted as surplus.

In subsection (b), before clause (1), the words "Secretary of the Treasury" are substituted for "Treasury Department" for consistency. The words "out of any money in the Treasury not otherwise appropriated" in 31:725q–1 [former section 725q–1 of this title] are omitted as surplus. In clause (1), the words "of the character formerly chargeable to the appropriation accounts abolished under section 725p of this title" in 31:725p–1 [former section 725p–1 of this title] are omitted as unnecessary because of the restatement. In clause (2), the words "United States Government account 'Refund of Moneys Erroneously Received and Covered' " are substituted for "of the character formerly chargeable to the appropriation accounts abolished under section 725q of this title" in 31:725q–1 [former section 725q–1 of this title] for clarity and to eliminate unnecessary words.

In subsection (c)(1), the words "claims for . . . deposits" are substituted for "claims by or on behalf of depositors" to eliminate unnecessary words. The text of section 1(a) of the Act of August 13, 1971 (Pub.L. 92–117, 85 Stat. 337), is omitted as executed.

References in Text. Section 1(a) of the Act of August 13, 1971, referred to in subsec. (c)(1), is section 1(a) of Pub.L. 92–117, Aug. 13, 1971, 85 Stat. 337, which was set out as a note under former section 725p of this title and repealed by Pub.L. 97–258, § 5(b), Sept. 13, 1982, 96 Stat. 1081.

Cross References

Annual report to Congress to include estimates of amounts for payment under this section, see section 331 of this title.

Presumption that individuals' whereabouts is unknown if no application for refund of veteran's contributions to educational benefits program is received within specified time, see section 1632 of Title 38, Veterans' Benefits.

Transfer and disposition of balances in trust funds administered by Veterans' Administration representing moneys belonging to individuals whose whereabouts are unknown, see section 3204 of Title 38.

[From Decisions of the Comptroller General]

[B-183949]

Securities and Exchange Commission—Fees—Investment Adviser—Refunds

Annual charge assessed pursuant to User Charge Statute, 31 U.S.C. 483a, by Securities and Exchange Commission (SEC) upon investment advisers and deposited in Treasury as miscellaneous receipts, which charge is now considered erroneous by SEC because of recent Supreme Court decisions, may be refunded by SEC out of permanent indefinite appropriation established by 31 U.S.C. 725q-1 to pay moneys "erroneously received and covered." This refund is authorized to all who paid such invalid fee regardless of whether payment was made under protest.

In the matter of refund by Securities and Exchange Commission of investment adviser fees, September 22, 1975:

This decision is in response to a request from the Chairman of the Securities and Exchange Commission (SEC). On March 29, 1974, the SEC repealed its $100 annual assessment imposed upon investment advisers registered with the Commission. This fee was charged, pursuant to the User Charge Statute, 31 U.S. Code § 483a (1970) to all investment advisers registered with Commission, whether or not any services were performed on behalf of the registrant. The fee was imposed only for the years 1971, 1972 and 1973.

The charge was repealed in response to two recent Supreme Court decisions construing the User Charge Statute. While the decisions did not deal specifically with these investment adviser fees, the SEC feels that its annual investment adviser fee did not meet the criteria set forth in those decisions. See *National Cable Television Association, Inc.* v. *United States, et al.*, 415 U.S. 336 (1974) and *Federal Power Commission* v. *New England Power Company, et al.*, 415 U.S. 345 (1974). *Cf. id.*, fn. 4, p. 350, where these fees are mentioned.

The Commission is now in receipt of numerous requests for refunds of the $100 fee from persons registered as investment advisers during the 3 years in question. The Commission desires to return the fees but it questions the right of a person to a refund of fees erroneously collected in the absence of a protest at the time the fee was paid. In this regard we are advised that it would probably be impossible for the Commission to ascertain whether any given registrant paid under protest. Hence the Chairman of SEC seeks our decision on the SEC's authority to refund the subject fees.

If the SEC, in accordance with the aforementioned Supreme Court decisions, determines that it has erroneously assessed the annual investment advisers fees, and if it has deposited those funds as miscellaneous receipts in the Treasury, it may initiate action to refund those moneys out of the permanent indefinite appropriation established by 31 U.S.C. § 725q–1 (1970). That section appropriates to the Treasury Department, out of any moneys not otherwise appropriated, such sum—to be known as a permanent indefinite appropriation— as may be necessary for the purpose of refunding moneys erroneously received and covered into the Treasury. There is nothing in that section which differentiates between funds received under protest and those received without protest. Moreover, as an equitable matter, when the Government has erroneously charged a fee, we see no reason to in effect penalize those who do not raise objections to payment of the fees to the charging agency. Hence, if the SEC desires, it may, in our view, refund the erroneously received and covered funds to all those who paid it.

The Chairman suggests that if a refund is authorized, the fees should be reclassified from the original receipt account to the SEC's deposit fund suspense account 50X6875. However, since in the instant situation the investment adviser fee was void *ab initio*, the procedure set forth in paragraph (2) of our circular letter of March 24, 1960, B–142380 (a copy of which is being sent to the Chairman of the SEC), to the heads of departments, independent establishments and others concerned, must be employed in the refund of the subject fees. See also Treasury Fiscal Requirements Manual, section 3070.10 (1973).

Mr. MATHESON. It is a permanent appropriation, and so no further appropriation action would be required by the Congress. Once this legislation is passed, one Treasury can proceed to implement the refunds that would be necessary.

Senator EVANS. Under the court decision which I understand applied only to the particular claimant who brought the suit, would it be necessary to refund the entire 2 percent to that claimant? And if the law was passed, would it be appropriate to refund the difference between 2 percent and the 1.5 percent?

Mr. MATHESON. Well, our intention would be to treat the Sperry Corporation in the same fashion as other claimants. In that case, it would amount to a refund of the difference between the 2 percent already deducted and the 1.5 percent figure which would apply to Sperry under your version of the legislation.

Senator EVANS. OK. Just one final question—I have a number of questions for the record which we will submit to you—but on the Freedom of Information portion of the bill, what kinds of documents would be shared with claimants as a result of this narrow exception, and what is the need? I am always reluctant, as I think those of us in Congress are, to create exceptions to the Freedom of Information Act. What is the specific rationale, and give a description of the kinds of documents that are necessary to withhold.

Mr. MATHESON. Yes; as you may know, this was a provision which we included originally at the request of the claimant community. It is designed to enable us better to share information which would be useful to them in the prosecution of their claims before the Tribunal. There are two kinds of documents which pose potential problems.

One is the pleadings to the Tribunal, which under the Tribunal rules are to be held in confidence. Our concern there is that if we shared these pleadings with the claimant community, then under the Freedom of Information Act we might be required to share them with the general public and thus violate Tribunal rules.

Senator EVANS. So in that case you would not be withholding anything that under normal circumstances would be subject to the Freedom of Information Act? Those Tribunal proceedings are confidential and would remain confidential, and this would really not change current circumstances?

Mr. MATHESON. Yes; the difficulty would be that by providing them to some members of the public we might therefore lose whatever protection we have.

Senator EVANS. I understand that.

Mr. MATHESON. The other kinds of materials are such things as U.S. Government draft pleadings or other kinds of background materials which we might find useful to share with claimants, but we would not wish to have immediately in the hands of potential adverse parties. So we would wish to be able to give them to appropriate claimants, but not to release them generally under the FOIA.

Senator EVANS. Would it also be true in those cases that those draft proceedings and other legal papers would not be subject to the Freedom of Information Act insofar as they relate to your work for the Government itself?

Mr. MATHESON. It probably depends on the specific character of the documents in question. Some probably would have protection,

and others not. But in any case, once we begin disclosing them we open up the possibility of being forced to disclose them generally.

Senator EVANS. Short of this provision in the legislation, if you were just operating with the proceedings that you were developing for the U.S. Government as a client, those would not normally be subject to the Freedom of Information Act in draft form?

Mr. MATHESON. I think that is generally true, but there may be some cases in which it would not have protection.

Senator EVANS. In those cases where you would not have protection now, would this provision put them in the same category under this act? In other words, would it encompass things being kept in confidence under the act that would not normally be kept in confidence under current proceedings?

Mr. MATHESON. I think there would be some categories in which that might be true. It depends upon how you read some of the exemptions in the FOIA like those for attorney work products and information provided in confidence.

Senator EVANS. Thank you very much, Mr. Matheson. We will have the other questions sent to you.

Mr. MATHESON. Thank you, sir.

Senator EVANS. The second panel is Mr. Arthur Rovine of Baker & McKenzie; Mr. Philip R. McKnight of Ivey, Barnum & O'Mara of Greenwich, CT; and Mr. Timothy Dickinson of Gibson, Dunn & Crutcher of Washington, DC.

If you gentlemen will come forward. Thank you, gentlemen. We will start with Mr. Rovine.

STATEMENT OF ARTHUR W. ROVINE, BAKER & McKENZIE, NEW YORK, NY

Mr. ROVINE. Thank you, Mr. Chairman.

I am very grateful for the opportunity to appear here today to present another view with respect to this bill. I come to the issue from a different perspective from that you have just heard. Despite my previous positions with the Government, I felt then and I feel now that I cannot support any fee.

I served in the Department of State for 11 years, including a period of service as the first U.S. representative or agent to the Hague Tribunal from May 1981 to August 1983, and I then came to private practice at Baker & McKenzie. We represent over 40 claimants at the Tribunal.

I am also chairman-elect of the international law section of the American Bar Association, although I am not speaking here on behalf of the section or the ABA, nor do I speak on behalf of the U.S. Iranian Claimants Committee [USICC]. That committee is divided on the appropriateness of the bill. Mr. Lawrence Newman, also of Baker & McKenzie, and Chairman of USICC's Steering Committee, has authorized me to say that he is strongly opposed to this bill and to any fee for claimants.

I am of course fully aware of the valuable services performed by the Government, and I would like to think that I helped serve as well when I was the U.S. agent at The Hague. Since I left the Department, it is clear that the agent's office in The Hague and the Iran Claims Office in Washington, as well as Treasury and Justice

officials, have performed exceedingly well. Their work has been absolutely first rate in my judgment.

But I felt when I was the agent, and said so, and I feel today that charging for this work and for the Tribunal is unfair and has no sound policy underlying it. The fee proposal, in my view, has several fundamental problems.

First, as a general proposition the courts of the United States are open to all claimants, including foreign claimants, without charge aside from a nominal filing fee. The Government does not subtract 2 percent or 1 percent, or any fee, from the awards or judgments handed down by the courts. I see no reason to treat the claimants at the Tribunal any differently. Hundreds of them had in fact filed cases in the Federal courts, but by Executive order had them suspended, had their attachments vacated, and were remitted to the Hague Tribunal where only one-third of the members are Americans.

The claimants were not given the choice between U.S. courts and a new tribunal. Had it been done that way, a fee might have been justified; but claimants were not given a choice. They were forced out of Federal courts where there is no fee and into the Tribunal where the Government would like to impose a fee.

It is true that some of the claimants are better off in The Hague than in Federal court since they will not have to face sovereign immunity or act-of-state defenses in The Hague. These would be difficult issues in Federal court in many cases. But it is not fair, in my view, for the Government to say to claimants: You have no choice, but it is all right, because we say you are better off in the Hague Tribunal; and then charge a fee for the Hague Tribunal.

In my view, that judgment should be left to the individual claimants and not made by the Government. Once we start arguing over who is better off in The Hague and who is better off in the U.S. courts, then we run into the second problem, the court of claims problem: Trying to establish a rational basis for the fee. In my judgment, Mr. Chairman, that cannot be done.

It is not possible to determine who is better off at the tribunal and who is not. You cannot say with any precision who has benefited from the Government's services and who has not. We do not even know with precision who tried to take advantage of the Government's services and who did not. Of the 131 awards made so far in favor of U.S. claimants, 92 were settlements, and in most of those instances of settlement the claimants did not rely on any assistance from the Government; but they have nevertheless been charged the fee.

Surely a charge should be related to the costs incurred and the benefits received. But then, why have the banks not been charged a fee? They have certainly used the Tribunal. They have filed cases there and they have certainly used the services of Treasury officials. Why no fee for the banks? Why should the claimants who receive awards of less than $5 million be charged 1.5 percent while those with larger awards, either arbitrated or settled, pay only 1 percent?

It is true that at some point, no matter how large the award, the benefit received—whatever that might be—does not continue to increase, and the cost does not rise, but why the break at $5 million?

If there has to be a fee—and I am opposed to it—make it 1 percent across the board. If there has to be a breakpoint—and I am opposed to a breakpoint—make it $1 million. It is a very rough kind of justice, in my view too rough really to be justice.

There is a question about claimants who lose their cases. They pay nothing, but they often require far more assistance from the Government because they have difficult cases. They use the Tribunal, too, and their cases cost money. When I was an agent, I certainly spent time, a lot of it, with claimants who had difficult problems. That is a key function of the agent and the staff, but those who lose cases pay no fees at all.

There is of course the problem of cases by the U.S. Government and Iran against each other. A tremendous effort in research, brief writing, and oral argument is required, but the benefit is for the Government. The claimants may be paying for this, too. Government lawyers, quite properly, devote most of their time to working on Government cases. There is no reason why private claimants should pay any part of that.

How can we be certain that that part of their Tribunal work is not covered by the fee? We are not. It cannot be shown.

Chief Judge Alex Kozinski of the U.S. Claims Court in his opinion on May 1, rendering the user fee illegal, said that it was not an exaggeration but a plain statement of fact to say that there is nothing in the record to suggest any thought as to what the benefits were that were being conferred upon the people who were going to be charged the fee, and no thought at all in relating those benefits to the costs incurred by the Government, and somehow coming up with a fee that reasonably attempted to match benefits and costs.

He characterized the percentage fee as a suspect mechanism—those are his words—and he stated that the 2-percent fee seems to bear no relationship at all to actual costs that have been imposed upon the process on the one hand, or the benefits derived from the process on the other. He said nothing has been presented by the Government to suggest that such a relationship exists, or that such a relationship could be established.

Mr. Chairman, since in court proceedings there is no way of relating the charges to the costs incurred or the benefit received, it would be far better policy to do precisely what the courts do in this country—charge a nominal filing fee and nothing else. Society has established a court structure to resolve disputes, and society pays for that structure because it benefits the Nation to have such a system.

There is no reasonable method for charging a fee to the winners in U.S. courts, and so we do not charge a fee. We do not require the winners to pay for those courts, and the U.S. claimants at The Hague should be treated no differently.

I know it has been said that this small charge will not break the claimants. It will not break the Government, either. And as between the Government and the claimants, it is clearly more difficult for the private claimant to absorb the loss.

We then come to the third basic problem with the proposed fee. That is, that while the Government has incurred costs at the Hague Tribunal—we heard Mr. Matheson say about $4 million a year—it is also true that the Government has saved millions of dol-

lars by removing the claimants' cases from the Federal courts. But we still have not yet received an analysis of those savings from the Government.

We do not know precisely how much it costs to process a case through the Federal court system, but certain reasonable estimates can be made. The Administrative Office of the United States Courts says that the toal fiscal year 1984 budget for the Federal judiciary, excluding Supreme Court costs, was $875 million. The total number of cases pending in the year ending June 30, 1984, both civil and criminal cases, was $270,000. An average figure per case per year is $3,240—that is my division.

Assuming 4,000 Iranian-related cases in the Federal courts, the Government would have spent almost $13 million per year on those cases. Had there been only 2,000 cases in the courts, the Government's costs would have been almost $6.5 million per year—and the Government is not spending anything like those amounts of money at the Tribunal. Iran, of course, is paying half of all Tribunal costs.

It is difficult to calculate, of course, how many years the claimants cases would have taken in the courts and how many years they will require in the Tribunal, but the Federal court cases were clearly complex and novel. The Foreign Sovereign Immunities Act would have been explored exhaustively. There were difficult attachment issues, letters of credit issues, appeals up and down, lengthy discovery processes, counterclaims, and complicated trials in at least some of the cases. The costs would have been high. The number of cases would also have been numerous, judging from the cases filed at the Tribunal so far. I think 2,000 is a moderate estimate.

At the very least, Mr. Chairman, before this bill goes forward, it seems to me it is incumbent upon Treasury and State to come forward with an acccurate analysis showing how much money they estimate they have saved by removing these cases from the Federal courts, and whether or not that total savings is less than their expenditures at The Hague. Only in the latter case would there be any justification for a fee, and even then I would oppose it for the general reasons I have outlined. But it does seem to me that until and unless the Government presents an analysis of its savings, there is no justification whatever for moving forward with a bill.

It has been said, well, this is a separate court; the U.S. Government's share is more easily identifiable, but that argument has no merit.

Expenses may be more easily identifiable, but that does not mean the claimants should pay them. And because the Iran cases in Federal court would be part of a larger structure does not mean the expenses do not exist. The expenses are very real, as shown by the Government's own statistics.

Furthermore, the Government not infrequently sets up new and separate courts without requiring winners to pay a percentage of their judgments to the Government. We have a separate court of international trade. We have bankruptcy courts. We have a new court of appeals for the Federal circuit. In no case do we require winners to pay money to the Government, and in every case the value of the services and the value of having such courts are clear.

Mr. Chairman, I am also seriously concerned with the fourth problem in this bill—that is, its retroactivity feature. It proposes an effective date of June 7, 1982, 3 years ago. In my view, that also is unfair. Normally if a fee or a tax is collected by the Government and it turns out that there was no basis for that fee or tax, then the money is returned by the Government. In this case, the Court of Claims recently decided that that 2 percent fee charged had no legal basis, and the attempt now to impose that legal basis retroactively for the sake of legitimizing in whole or in part an illegal collection of $6 million strikes me as wrong. With an amount of money as small as that, it should not be difficult for the Government to get the principle right. We do not usually impose taxes or fees retroactively, even though it is permissible as a matter of law. I see no reason to impose this fee retroactively now.

I should add, too, that the original 2 percent fee was imposed 5 months after the end of the filing period for claimants at The Hague. You recall that the Algiers accords went into effect January 19, 1981. The first meeting of the Tribunal was held on July 1, 1981, and this fee was imposed in June 1982.

Having been forced out of Federal court into the Tribunal, only later were claimants told that they would have to pay half of the Tribunal's expenses while the Government of Iran would pay the other half.

Finally, Mr. Chairman, this bill is an attempt to create legal authority for the fee very quickly. Indeed, I have been told that the bill would be attached to the State authorization bill, which appears to be a rather attractive vehicle. It will not receive much attention and can be adopted quickly by both Houses of Congress. But rushing bills through this way can lead to mistakes. I think it has in this case. The errors are not technical. They are not minor details. They are fundamental.

To sum up, first, a fee for a Tribunal that is forced on claimants who wanted to pursue a Federal court case but are told you are better off in the Tribunal is unfair. A fee that cannot be reasonably matched against costs incurred or benefits received, says the Court of Claims, that, too, in my judgment, is unfair. A fee that is charged without taking into account the savings—millions of dollars of savings—realized by removing cases from Federal court is unfair, and a fee that is applied retroactively is unfair.

The fee in this bill is all of those, and it is all of those together.

The Iran hostages tragedy was settled in a way which was thought to serve the interests of American society as a whole. When the President's action in suspending claimants court cases and vacating their attachments was challenged, the Supreme Court upheld the arrangements on grounds that had nothing to do with benefits to claimants, but rather with benefits of a foreign policy nature that apply to all of us, and it is unfair later to be informed, much later, that claimants must help pay for those arrangements.

It is not enough that the amounts of money involved here are small. It is far more important to get the principle right. If the amounts are small for the claimants, they are also small for the Government. So in those circumstances, let us do it right. Let us do it the way it normally is done through the American judicial structure: There should be no fee or tax on any of the awards.

Very quickly, I am very much concerned also with section 2(a) of the bill which authorizes the Foreign Claims Settlement Commission to receive and determine the validity and amounts of claims. It does not say small claims; it says claims by nationals of the United States against Iran which are settled en bloc by the United States.

As Mr. Newman testified 2 years ago before the House Foreign Affairs Committee when this provision was introduced, the proposal is ill-advised for a few reasons. There does not appear to be any need for the provision, since as far as we know no real possibility exists for any lump-sum settlement of the large claims. I am not certain about the small claims. There does not appear to be a necessity for the provision.

Second, if a lump-sum settlement is reached, in my view it would be far better for Congress to examine that settlement and decide at that time the manner in which the sum should be distributed to claimants. Surely the Congress should not commit itself now without knowing how large a settlement is agreed to with Iran and how many claimants had yet been unpaid at the Tribunal.

Third, since the adoption of the Foreign Sovereign Immunities Act of 1976, it remains to be determined to what extent the executive has the legal capacity to enter into lump-sum settlement agreements extinguishing the claims of American nationals against foreign states. That is a very complex and difficult legal issue. It should certainly not be decided by implication or by bootstrap in a rather hasty addition, as I understand it, to the State authorization bill. The legal process deserves far better than that.

Mr. Chairman, thank you very much. I would be happy to answer any questions, if I can.

[Mr. Rovine's prepared statement follows:]

Senator EVANS. Thank you very much. We will hear from the other two members of the panel, and then be subject to questions.

Mr. McKnight.

STATEMENT BY ARTHUR W. ROVINE BEFORE THE SENATE
FOREIGN RELATIONS COMMITTEE CONCERNING
THE PROPOSED IRAN CLAIMS SETTLEMENT ACT

May 20, 1985

I am very grateful for the opportunity to appear here today to present another view with respect to the proposed legal authorization for a charge to claimants who win awards at the Iran-US Claims Tribunal at the Hague. I come to this issue from a different perspective from the Government attorneys and others who support the measure before you. Despite my previous positions with the Government, I felt then, and feel now, that I cannot support any fee.

I served in the Department of State for 11 years, including a period of service as the first United States Representative (or "Agent") to the Hague Tribunal from May 1981 until August 1983. I then came to private practice at the New York office of Baker & McKenzie. Our office represents over 40 claimants at the Tribunal. I am also Chairman-Elect of the International Law Section of the American Bar Association, although I am not speaking here on behalf of the Section or the ABA. Nor do I speak on behalf of the U.S.-Iran Claimants' Committee ("USICC"). The Claimants' Committee is divided on the appropriateness of this bill. Mr. Lawrence Newman, also of Baker & McKenzie, and Chairman of USICC's Steering Committee, has authorized me to say that he is strongly opposed to this bill, and to any fee for claimants.

I am, of course, fully aware of the valuable services performed by the Government. I would like to think that I helped serve as well when I was the United States Agent to the Tribunal, and since I left the Department of State, it is clear that the Agent's office in the Hague and the Iran Claims' office in Washington, as well as Treasury and Justice officials, have performed magnificently. The officials who labor on these matters deserve the highest praise. Their work has been absolutely first rate in my judgment.

But I felt as Agent and I feel today that charging for this work and for the Tribunal is unfair, and has no sound policy underlying it. The fee proposal has several fundamental problems. First, as a general proposition, the courts of the United States are open to all claimants, including foreign claimants, without charge aside from a nominal filing fee. The Government does not subtract 2 percent or 1 percent or any fee from the awards or judgments handed down by United States courts, whether federal or state. I see no reason to treat the claimants at the Iran Tribunal any differently. Hundreds of them in fact had filed cases in the Federal courts, but by executive order had them suspended, had their attachments vacated, and were remitted to a Tribunal in the Hague where only one-third of the members are Americans. The claimants were not given a choice between U.S. courts and a new Tribunal at the Hague. Had it been done that way, a fee might have been

justified at the Hague. But claimants were not given a choice -- they were forced out of Federal courts, where there is no fee, and into the Tribunal, where there is a fee.

It is true that some of the claimants are better off in the Hague Tribunal than in Federal Court, since they will not have to face sovereign immunity or act of state doctrine defenses in the Hague. These would be difficult issues in many cases in Federal courts. But it is not fair for the Government to say to claimants you have no choice but it's okay because you're better off in the Hague Tribunal, and then charge a fee for the Hague Tribunal.

Once we start arguing over who is better off at the Hague and who is better off in U.S. courts, we run into the second problem, and that is trying to establish a rational basis for the fee. In my judgment, Mr. Chairman, that cannot be done. It is not possible to determine who is better off at the Tribunal and who is not. It is not possible to say with any precision who has benefitted from the Government's services and who has not. We only have the roughest idea of who even tried to take advantage of the Government's services at any point, and who did not. Of the 131 awards in favor of U.S. claimants, 92 were settlements. In most instances of settlement, the claimants did not rely on assistance from the Government, but they have nevertheless been charged the fee.

Surely a charge should be related to the costs incurred and the benefits received. But in that case, why have the banks been charged no fee? The banks certainly used the Tribunal and the services of Treasury officials. Why no fee for the banks? Further, why should the claimants who receive awards of less than $5 million be charged one and a half percent, while those with larger awards, either arbitrated or settled, pay only one percent of their awards? It is true that at some point, no matter how large the award, the benefit received, whatever that benefit might be, does not continue to increase, and the cost does not rise, but why the break at $5 million? If there has to be a fee, and I am opposed to a fee, make it 1% across the board; if there has to be a break-point, and I am opposed to a break-point, make it $1 million. This is a very rough kind of justice; it is too rough really to be justice.

What about claimants who lose their cases? They pay nothing, but often require far more assistance from the Government because they have difficult cases. They use the Tribunal too, and their cases also cost money. As Agent I certainly spent time with claimants who had difficult problems -- that is a key function of the Agent and his staff. Yet those who lose cases pay no fee at all.

Another problem is cases by the U.S. Government and Iran against each other. Tremendous effort, in research, brief

writing and oral argument is required. But the benefit is for the Government. Yet the claimants may be paying for this too. The Government lawyers quite properly devote most of their time to working on Government cases. Why should private claimants pay any part of that? They shouldn't, but how can we be certain that that part of their Tribunal work is not covered by the fee. It can't be shown.

On May 1, Chief Judge Alex Kozinski of the United States Claims Court rendered an opinion from the bench declaring the current 2% fee illegal. He said that it was

> not an exaggeration but a plain statement of fact to say there's nothing in the record to suggest any thought as to what the benefits were that were being conferred upon the people who are going to be charged the fee and no thought at all in relating those benefits, to the costs incurred by the government, and somehow coming up with a fee that reasonably attempted to match benefits and costs. (transcript of proceedings, May 1, 1985, pp. 157-158.)

Chief Judge Kozinski characterized the percentage fee as a "suspect mechanism" (at p. 161) and he stated that the 2% fee as instituted, particularly with respect to the plaintiff (the Sperry Corporation) "seems to bear no relationship at all to actual costs that have been imposed upon the process on the one hand, or the benefits derived from the process on the other."

Chief Judge Kozinski said that "nothing has been presented by [the Government] to suggest that such a relationship exists or such a relationship could be established." (at pp. 162-163.)

Mr. Chairman, since in court proceedings there is no way of relating the charge to the costs incurred or the benefit received, it would be far better policy to do precisely what the courts in this country do; i.e., charge a nominal filing fee, but nothing else. Society has established a court structure to resolve disputes, and society pays for that structure because it benefits the nation to have such a system. There is no reasonable method for charging a fee to the winners in U.S. courts, and so we don't charge a fee. We don't require the winners to pay for those courts. The U.S. claimants at the Hague should be treated no differently.

It has been said, Mr. Chairman, that a one percent or one and a half percent fee will not "break" a claimant at the Tribunal. That is correct. But the loss of that one or one and a half percent fee will not break the Government either, and as between the Government and a private claimant, it is clearly more difficult for the private claimant to absorb the loss. Given the equities involved, and a system of "rough justice" that is so very rough, it would be fair for everybody concerned and certainly more in accord with traditional American practices to charge the winners at the Tribunal no fee whatever.

We now come to the third basic problem with the proposed fee in the bill before us, and that is that while the Government has incurred costs with respect to the Hague Tribunal, it is also true that the Government has saved millions of dollars by removing the claimants' cases from the Federal courts. But until today we have not received an analysis of those savings from the Government. We do not know precisely how much it costs to process a case through the Federal court system, but certain reasonable estimates can be made.

According to figures published by the Administrative Office of the United States Courts, the total FY 1984 budget for the Federal Judiciary, excluding Supreme Court costs, was $875,000,000. The total number of cases pending in the year ending June 30, 1984, including both civil and criminal cases, was 270,000. An average figure per case per year is therefore $3,240.

Assuming 4,000 Iranian-related cases in the Federal Courts, the Government would have spent almost $13 million per year on those cases. Had there been only 2,000 cases in the Federal Courts, the Government's costs would have been almost $6.5 million per year. The Government is not spending anything like those amounts of money at the Tribunal. Iran, of course, pays half of all Tribunal costs. And while it is difficult to

calculate how many years claimants' cases would have taken in the Federal courts, and how many years they will require in the Tribunal, the Federal court cases were clearly complex and novel. The Foreign Sovereign Immunities Act, a new statute, would have been explored exhaustively. There were difficult attachment issues, letter of credit issues, appeals up and down, lengthy discovery processes, counterclaims, and complicated trials in some cases. The costs would have been high.

The cases in Federal courts would also have been numerous. At the time the cases were suspended, there were some 100 cases in the Southern District of New York alone. That is a single trial-level Federal court. Many more had been filed throughout the country. We don't know how many small claimants would have filed, but surely some. The Government of Iran has filed cases in the United States, and would likely have filed more but for the Tribunal. Certainly there would have been many Iranian counterclaims, just as there are at the Tribunal. Two thousand cases is a very moderate estimate. There were initially almost 4,000 cases at the Tribunal, including bank claims, government- to-goverment disputes, and interpretive disputes.

At the least, Mr. Chairman, before this bill goes forward, it seems to me it is incumbent upon the Treasury and

the Department of State to come forward with an accurate analysis showing how much money they estimate they have saved by removing these cases from the Federal courts, and whether or not that total savings is less than their expenditures at the Hague. Only in the latter case would there be any justification whatever for a fee, and even then I would oppose it for the general reasons I have already outlined. But it does seem to me that until and unless the Government presents an analysis of its savings, there is no justification whatever for moving forward with this bill.

Mr. Chairman, it has been said that the Hague Tribunal is a new and separate court, and that the U.S. Government share of those expenses is therefore easily identifiable and thus can easily be paid for by the claimants. This is said to differentiate the Hague Tribunal expenses from those of Federal courts, where the Iran cases would be buried in a large judicial structure.

But that argument has no merit. Because expenses are more easily identifiable does not mean that claimants should pay them. And because the Iran cases in Federal court would be part of a larger structure does not mean that the expenses don't exist. The expenses are all too real, as shown by the Government's own statistics.

Further, the Government not infrequently sets up new and separate courts without requiring winners to pay a percentage of their judgments to the Government. We have a separate Court of International Trade; we have separate bankruptcy courts; we have a new Court of Appeals for the Federal Circuit. In no case do we require the winners to pay money to the Government, and in every case the value of the services performed for the disputants and the value of having such courts is clear.

Mr. Chairman, I am also seriously concerned with a fourth problem of this bill, and that is its retroactivity feature. The bill proposes an effective date of June 7, 1982 -- three years ago. In my view, that too is unfair. Normally, if a fee or tax is collected by the Government, and it turns out that there was no legal basis for that fee or tax, then the money is returned by the Government. In this case, the Court of Claims recently decided that the 2% fee charged by the Government has no legal basis. The attempt now to impose that legal basis retroactively, for the sake of legitimizing, in whole or in part, an illegal collection of $6 million, strikes me as wrong. Surely, with an amount of money as small as that, it should not be difficult for the Government to get the principle right. We don't usually impose taxes or fees in this country retroactively, even though it is permissible as a matter of law. I see no good reason to impose this fee retroactively now.

I should add that the original 2% fee was imposed five months after the end of the filing period for claimants at the Hague. You will recall that claimants had to file their cases at the Hague no later than January 19, 1982. Only in June 1982 did claimants learn that a 2% fee would be imposed if they received an award or settled a case. Having been forced out of Federal court into the Tribunal, only later were claimants told they would have to pay half of the Tribunal's expenses, while the Government of Iran paid the other half.

Finally, Mr. Chairman, this bill is an attempt to create legal authority for the fee very quickly indeed. A bill such as the State Department Authorization Bill appears to be a rather attractive vehicle, because it will not receive much attention and can be adopted quickly by both Houses of Congress.

But rushing bills through this way often leads to mistakes, as I believe it has in this case. The errors are not technical, or those of minor detail. They are fundamental. A fee for a Tribunal that is forced on claimants who wanted to pursue a Federal court case is unfair. A fee that cannot be reasonably matched against costs incurred or benefits received is unfair. A fee that is charged without taking into account the savings realized by removing cases from Federal court is unfair. A fee that is applied retroactively is unfair. The fee in this bill is all of those, and it's all of those together.

The Iran hostages tragedy was settled in a way which was thought to serve the interests of American society as a whole. When the President's action in suspending the claimants' Federal court cases and vacating their attachments was legally challenged, the Supreme Court, in Dames & Moore v. Regan, upheld the arrangements on grounds that had nothing to do with benefits to claimants, but rather with benefits of a foreign policy nature that apply to all of us. It is unfair later to be informed that claimants must help pay for those arrangements.

It is not enough that the amounts of money involved here are small. It is far more important to get the principle right. If the amounts of money are small for the claimants, the amounts are also small for the Government. In those circumstances let's do it right; let's do this the way it normally is done in the American judicial structure. There should be no fee or tax on any of the awards.

Mr. Chairman, I am also very much concerned with Section 2(a) of the bill, which authorizes the Foreign Claims Settlement Commission to receive and determine "the validity and amounts of claims by nationals of the United States against Iran which are settled en bloc by the United States." As Mr. Newman testified two years ago in the House Foreign Affairs Committee when this provision was introduced, the proposal is ill-advised for a few basic reasons.

First, there does not appear to be any need for the provision since as far as we know no real possibility exists for any lump sum settlement of the large claims. So there is no necessity for this provision. Second, if a lump sum settlement is reached, it would be far better for Congress to examine the settlement and decide at that time the manner in which the sum should be distributed to claimants. Surely the Congress should not commit itself now without knowing how large a sum was agreed to with Iran, and how many claimants had yet been unpaid at the Tribunal. Third, since the adoption of the Foreign Sovereign Immunities Act in 1976, it remains to be determined to what extent the Executive has the legal capacity to enter into lump sum settlement agreements extinguishing the claims of American nationals against foreign states. That complex issue should certainly not be decided by implication and by bootstrap in this rather hasty addition to the State Authorization bill. The legal process deserves far better than that.

Thank you very much, Mr. Chairman.

STATEMENT OF PHILIP R. McKNIGHT, IVEY, BARNUM & O'MARA, GREENWICH, CT

Mr. McKNIGHT. Thank you, Mr. Chairman.

I do not have a prepared statement, but I do have a slightly different point of view than Mr. Rovine with respect to the pending legislation. My firm, Ivey, Barnum & O'Mara in Greenwich, represents a relatively small claimant before the Tribunal, but its claim is in an amount large enough so that we do not have the benefit of the Government handling the claim for us.

Logos Development Corp. has a claim before the Tribunal for $450,000. We therefore do not receive the direct benefit of Government representation. The company is a very small one in Middletown, NY. The claim arose, a breach of contract claim, in September 1978. At that time, the company had few employees, but it did have a very interesting and relatively novel device which two of its people had been able to create.

They were able to translate from one language into another by use of a computer. The computer has the ability to type in one language on the keyboard and have the typewriter come back in another language. They developed this system for the U.S. Government during the Vietnam war, first doing the Vietnamese language.

The second attempt was under contract to the Shah of Iran to translate into Farsi. As this committee knows Farsi is a right-to-left instead of left-to-right language, and the letters are not the same as a Westerner would recognize. It was a very difficult feat. They contracted with the Shah's government to create a demonstration phase, and they promptly created a 6,000-word vocabulary to show the Iranians that they could in fact go on to a more complicated system. In other words, they completed the demonstration phase.

They received one payment of $150,000. They did not receive the next three payments, and that is why their claim is in the amount of $450,000.

If I might first suggest the conclusion that I would like to bring to the committee, I will then try to justify it. The fee that this legislation contemplates, either the 1.5 percent on the first $5 million, which would clearly cover the Logos claim, or even the 2 percent the Government has been trying to assess in the past, that fee would not represent a very large amount of money to our client. One-and-a-half percent of $450,000 is around $7,000. But in the 8 years, actually 7 years since the claim arose—but we believe we will be heard sometime in 1986 by the Tribunal; we had a hearing date in December 1984, and it was postponed because of the assault on Mr. Mangaard in September of last year—if we are heard in January or February 1986, we will have been 8 years without that $450,000.

If we are permitted the interest which the Tribunal has considered in several of the cases before it—that is to say, the interest our people actually had to pay in order to borrow funds to survive—we would be entitled to 20 percent for the first 3 years of the breach. No bank would loan to us. We were too small; too risky. We had to borrow from private investors.

Afterwards, we were able to borrow at prime plus one or two points. The interest alone over the 8 years that we feel it is going to take before we are heard at the Tribunal and hopefully win will amount to another $450,000. The expenses of litigation to date—and legal fees are only a small part of this figure—the expenses of litigation amount to almost $90,000. We have a claim, therefore, which if we win will bring us almost $1 million.

This legislation proposes a 1.5 percent fee on that entire amount. We have now doubled the $7,000 fee to around $14,000 or $15,000. It seems to me that the fairest way to handle this, sir, would be either to establish a minimum figure below which the government would not assess its 1.5 percent fee—and I rather like Mr. Rovine's idea of a $1 limit—or assess the fee only on the amount of the claim the Tribunal actually awards, rather than the amount of additional damages it adds on, whether it be interest, expenses, or fees.

That way, the effort of the U.S. Government in helping clients like mine, which do not have a large enough claim to be able to take it to a large metropolitan law firm, my client will not be penalized and there will be no exaction of a fee on the interest and expenses they incurred in litigating their legitimate rights. They recognize that being a small company in Middletown, N.Y., they had every right to be in the District Court in New York, and that is where we were before that right was taken from us.

Now they have the additional expense of litigating this matter in a foreign country. And although I would bow to no one in my admiration of the Government's efforts on behalf of all the claimants—and I had the opportunity to speak with Mr. Rovine when he was the U.S. agent, and his office has done an absolutely superb job for us and for others that have had claims at the Tribunal—it is an enormous burden on the relatively small claimants to have this additional 1.5 percent or 2 percent Government fee imposed.

If the fee could be done away with—which obviously we would prefer—but if it cannot be, have it assessed only on the amount of the claim, and not on the additional amounts which have incurred because of the passage of time, or on the expenses, or on the fees involved in litigating a claimant's rights. I think that is about all I have.

Senator EVANS. Thank you very much, Mr. McKnight.

Mr. Dickinson.

STATEMENT OF TIMOTHY L. DICKINSON, VICE CHAIRMAN, COMMITTEE ON FOREIGN CLAIMS SECTION OF INTERNATIONAL LAW AND PRACTICE, AMERICAN BAR ASSOCIATION, WASHINGTON, DC

Mr. DICKINSON. Mr. Chairman, my name is Timothy L. Dickinson. I am in private practice in Washington, DC, and serve as an adjunct professor of law at Georgetown University Law Center. I am vice chairman of the American Bar Association's section of international law and practice, committee on foreign claims.

On behalf of Mont P. Hoyt, chairman of the section of international law and practice and John F. Olson, Chairman of the committee on foreign claims, and the members of the committee, I

would like to first express our appreciation to the Senate Foreign Relations Committee for inviting our committee of the ABA to present its views this afternoon.

Our committee was established by the American Bar Association's section on international law and practice at the time of the Iranian hostage crisis in order to provide an organized forum and voice for the American legal community with respect to the important issues involving rights of Americans whose person or property had been adversely impacted by the events of the Iranian revolution and hostage seizure.

Since its formation, the committee has worked in close cooperation with the Departments of State, Treasury, and Justice in development of the Iranian Assets Control regulations, negotiation of the Algierian Accords which led to the establishment of the Iran-United States Claims Tribunal in The Hague, and in monitoring and assisting the work of the Tribunal. Our committee has also actively monitored other foreign claims matters, including the KAL-007 incident, and most recently the events which occurred in Bhopal, India.

At the recommendation of our committee and the Section of International Law and Practice, the House of Delegates of the American Bar Association overwhelmingly adopted two resolutions supporting the work of the Iran-United States Claims Tribunal. Copies of both resolutions are attached to my statement, and I ask that they be entered into the record of these hearings.

Senator EVANS. They will be entered in full.

Mr. DICKINSON. Thank you.

In the first of those resolutions, the American Bar Association notes, among other points, the importance of providing adequate funding for the Office of Legal Adviser of the Department of State in order to assure adequate representation of American interests before the Tribunal in The Hague.

It is in response to that resolution that I appear before you today to recommend approval by your committee of S. 1166, the legislation which was introduced last Friday by Chairman Lugar and yourself. Other members of our committee and I have met with your staff and other interested parties in the administration to discuss similar legislation and we have reviewed the current draft.

We are satisfied that the fee schedule set out in the proposed act is reasonable under these circumstances and our committee of the American Bar Association recommends approval of the bill. We hope that this legislation will ensure that the Administration and the Congress will approve adequate funding for the essential services provided by the Legal Adviser's Office in both the United States and The Hague.

As you may know, those services include the maintenance of an office of the U.A. agent in The Hague and a very large staff devoted to the Iranian claims process here in Washington. Both of these offices, now headed by John Crook and David Stewart respectively, have provided countless invaluable services to American claimants appearing before the Tribunal.

In addition, the U.S. Government has undertaken the responsibility of representing before the Tribunal all small claimants—those who have claims of $250,000 or less. It is particularly impor-

tant for the protection of these small claimants that adequate resources be available to provide representation for their interests.

However, while recommending approval of this legislation, our committee would like to express our reservations about the wisdom of imposing a so-called user fee for Government services which are necessitated by the foreign policy initiatives of the American Government. Past claims programs have not imposed such a fee and the concept of taxing beneficiaries of treaty rights is one which deserves careful consideration to determine the propriety of such a policy and ensure equal application of such a principle.

Mr. Chairman, I appreciate this opportunity to present the views of our committee, and I would be pleased to respond to any questions.

[Mr. Dickinson's prepared statement follows:]

STATEMENT OF

TIMOTHY L. DICKINSON, VICE CHAIRMAN
COMMITTEE ON FOREIGN CLAIMS
SECTION OF INTERNATIONAL LAW AND PRACTICE
AMERICAN BAR ASSOCIATION

before the

COMMITTEE ON FOREIGN RELATIONS
UNITED STATES SENATE

in support of

S.1166
THE PROPOSED IRAN CLAIMS SETTLEMENT ACT

MAY 20, 1985

50-511 O—85——5

Mr. Chairman, my name is Timothy L. Dickinson and I am Vice Chairman of the American Bar Association's Section of International Law and Practice committee on Foreign Claims. On behalf of Mont P. Hoyt, Chairman of the Section of International Law and Practice and John F. Olson, Chairman of the committee on Foreign Claims, and the members of the committee, I would like to express our appreciation to the Senate Foreign Relations committee for inviting the ABA to present its views this afternoon. I am in private practice in Washington, D.C. and serve as an Adjunct Professor of Law at Georgetown University Law Center.

Our committee was established by the American Bar Association's Section on International Law and Practice at the time of the Iranian hostage crisis, in order to provide an organized forum and voice for the American legal community with respect to the important issues involving rights of Americans whose person or property had been adversely impacted by the events of the Iranian revolution and the hostage seizure. Since its formation, our committee has worked in close cooperation with the Departments of State, Treasury and Justice in development of the Iranian Assets Control regulations, in negotiation of the Algerian Accords, which led to the establishment of the Iran-United States Claims Tribunal in

The Hague, and in monitoring and assisting the work of the Tribunal. Our committee has also actively monitored other Foreign Claims matters, including the KAL 007 incident and most recently the events which occurred in Bhopal, India.

At the recommendation of our committee and the Section of International Law and Practice, the House of Delegates of the American Bar Association overwhelmingly adopted two resolutions supporting the work of the Iran-United States Claims Tribunal. Copies of both resolutions are attached to my statement and I ask that they be entered into the record of these hearings.

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It is in response to that resolution that I appear before you today, to recommend approval by your committee of S.1166, legislation which was introduced last Friday by Chairman Lugar and Senator Evans. Other members of our committee and I have met with your staff and other interested

parties in the Administration to discuss similar legislation and we have reviewed the current draft. We are satisfied that the fee schedule set out in the proposed Act is reasonable under the circumstances and the American Bar Association recommends approval of the bill. We hope that this legislation will ensure that the Administration and the Congress will approve adequate funding for the essential services provided by the Legal Adviser's office in both the United States and The Hague.

As you may know, those services include the maintenance of an office of the United States Agent in The Hague and a large staff devoted to the Iranian claims process here in Washington. Both of these offices, now headed by John Crook and David Stewart, respectively, have provided countless invaluable services to American claimants appearing before the Tribunal. In addition, the United States government has undertaken the responsibility of representing before the Tribunal all small claimants (those who have claims of $250,000 or less). It is particularly important for the protection of these small claimants that adequate resources be available to provide representation for their interests.

However, while recommending approval of this legislation, our committee would like to express our

reservation about the wisdom of imposing a so-called "user-fee" for government services which are necessitated by the foreign policy initiatives of the American Government. Past claims programs have not imposed such a fee and the concept of taxing beneficiaries of treaty rights is one which deserves careful consideration to determine the propriety of such a policy and ensure equal application of such a principle.

Mr. Chairman, I appreciate this opportunity to present the views of the American Bar Association. I would be pleased to respond to any questions.

[ATTACHMENT 1]

APPROVED BY THE HOUSE OF DELEGATES—AUGUST 1981

AMERICAN BAR ASSOCIATION REPORT TO THE HOUSE OF DELEGATES SECTION OF INTERNATIONAL LAW

1. RECOMMENDATION

The American Bar Association, Section of International Law, approves and recommends the following resolutions for adoption by the House of Delegates of the American Bar Association:

Be it resolved that the American Bar Association (without taking a position on the legal issues pertaining to the declarations which are now in the courts) commends the efforts of the Government of the United States of America in implementing the Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the settlement of claims with the Government of the Islamic Republic of Iran, as initiated on January 19, 1981, and in particular the Association commends the efforts of the Government of the United States to assure full, fair and prompt compensation of American claimants through settlement negotiations and through arbitration by an impartial international claims tribunal.

Be it further resolved that the American Bar Association believes that it is critical to the success of the claims settlement and arbitration process contemplated by the claims settlement agreement between the United States and Iran that the Office of Legal Adviser of the Department of State, and any other Government agencies concerned with implementing American participation in the settlement and arbitration process, be provided with sufficient resources to insure that resolution of claims, including the Government's representation of claimants with claims of less than $250,000, goes forward as expeditiously and efficiently as possible and with the highest professional quality of representation for American interests.

[ATTACHMENT 2]

APPROVED BY THE HOUSE OF DELEGATES—FEBRUARY 1985

AMERICAN BAR ASSOCIATION SECTION OF INTERNATIONAL LAW AND PRACTICE REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

Be it resolved that the American Bar Association:

1. Confirms its support of the principles of international law which call upon all parties to resolve disputes through peaceful means, including the arbitral process;

2. Confirms its support of implementation of the Algiers Accords, including the continued functioning of the Iran-United States Claims Tribunal (the "Tribunal") in an impartial and independent manner to resolve promptly and peacefully the claims placed within its jurisdiction;

3. Condemns the unprovoked attack on Judge Nils Mangard of the Tribunal on September 3, 1984 as contrary to the fundamental principle of peaceful settlement of international disputes and as wholly alien to the rule of law; and

4. In accordance with Goal VIII of the American Bar Association, calls upon other national and international organizations comprising members of the legal profession, to take appropriate action to affirm these essential principles and to condemn the attack on Judge Mangard.

Senator EVANS. Thank you very much, Mr. Dickinson.

We are pleased to welcome the Senior Senator from North Carolina, Senator Helms, to the hearing.

Mr. Rovine, you said in your statement that the Government does not subtract 2 percent, or 1 percent, or any fee from the awards or judgments handed down by the U.S. courts, whether Federal or State. Would you agree that the Foreign Claims Settlement Commission does apply a fee?

Mr. ROVINE. Yes; the Foreign Claims Settlement Commission does apply a fee, but in my view, Mr. Chairman, that is a totally

different situation and is not fairly made analogous to this tribunal.

First of all, the claimants were already, many of them, in Federal court and were taken out of court. That is not the case with the Foreign Claims Settlement Commission. They were forced out. They were told that it was either the tribunal or nothing, and the tribunal is good for you, so go there.

The tribunal is also different in the sense that it is very expensive. It is far away. There are translation costs. There are foreign travel costs. You do not have that with a commission in Washington. The tribunal is also made up of one-third of American judges. The Foreign Claims Settlement Commission of course is entirely American.

Furthermore, you have got the intervention of the Foreign Sovereign Immunities Act of 1976. There are now more rights in terms of lawsuits against foreign sovereigns, including attachments of their property. Before that, before the passage of the Foreign Sovereign Immunities Act, lump sum settlements which went to the Commission may have been the best claimants could do. It is not the best they can do any more.

So there is no analogy to be drawn between the Foreign Claims Settlement Commission fee and a fee imposed with respect to the tribunal.

Senator EVANS. I presume, then, that you when you say the Government does not subtract 2 percent or 1 percent or any fee from the awards or judgments handed down by U.S. courts whether Federal or State you are excluding the Foreign Claims Settlement Commission?

Mr. ROVINE. I am excluding the Commission, which is used for very special lump-sum settlements when they have been, before 1976, negotiated.

Senator EVANS. But you have not suggested that that is an inappropriate fee for that particular purpose?

Mr. ROVINE. I am not addressing that question at all. I am not suggesting it is inappropriate, no. I do not think we will get it anymore, however, since we are now post-1976.

Senator EVANS. No, but you are suggesting that——

Mr. ROVINE. It was a fee that was once upon a time appropriate because the whole system was once upon a time appropriate. That is now very much open to question, and Dames and Moore specifically left the question of a taking of U.S. claimants' property open.

Senator EVANS. You suggest that if everyone had chosen to go into Federal court it would add to the cost and that perhaps those costs might be greater than the Government is now trying to obtain through fees. Would that also have the effect of overloading the Federal courts?

Mr. ROVINE. Overloading the Federal courts? I do not know. It would have been very difficult in some respects. We may have had——

Senator EVANS. Let me put it this way. Would it have delayed suits in front of the Federal courts beyond what they otherwise would have been?

Mr. ROVINE. I am not sure whether the delays that might have been entailed, and there might have been some, would be any

greater than they are at the tribunal. In the tribunal, of course, the delays are great. You have just heard an example of one. Whether they would have been worse in the Federal courts? It is very hard to determine. I do not know.

Senator EVANS. You have no opinions at all as to whether the claimants would have been better off without the Algiers accords and without the tribunal and just allow things to go through the Federal courts?

Mr. ROVINE. I think that some claimants would have been better off in the tribunal—are better off in the tribunal. Some claimants are better off in Federal court. What I object to is the Government telling the claimants: You have no choice. We will not let you decide whether you are better off. We are sending you to The Hague whether you like it or not.

Now I do not mind that in terms of a settlement, if there is no fee. But to say to the claimants: We are making the judgment for you; you are better off in The Hague; and then charging a fee on top of it? That strikes me as unfair.

Senator EVANS. You would not care to speculate on what percentage of the claimants might have been better off to proceed on their own, as opposed to those who would go before the Tribunal?

Mr. ROVINE. There is no way of sorting it out, Mr. Chairman, which is another reason why the fee is inappropriate.

Senator EVANS. More than half? Less than half?

Mr. ROVINE. I cannot say. I honestly cannot say.

Senator EVANS. Do you care to say, Mr. McKnight?

Mr. MCKNIGHT. Senator Evans, with respect to Logos, we filed in the Federal court in December 1979, 2 years before the tribunal permitted filing—or even before the tribunal was set up. We would have been heard by now, even under multidistrict litigation rules. We would have had a resolution by now.

We are better off by having the security account, because we know where to go to get paid. We would not like to try to enforce a U.S. judgment in the Tehran public court.

Senator EVANS. That was my next question. Having succeeded in the Federal court, then where are you?

Mr. ROVINE. Well, we had several billion dollars worth of attachments against Iranian assets.

Senator EVANS. Would you have had to proceed against those and initiate a whole new suit?

Mr. ROVINE. Well, the way to enforce it of course is to proceed against the assets. And as I say, there were several billion dollars worth of attachments that had already been obtained by claimants in Federal courts. Now along with the suspension of those Federal court cases, those attachments were vacated. So the President was taking away the possibility of enforcing the lawsuits and saying we will give you an alternative method. We will set up a $1 billion fund in the Hague which may or may not be sufficient, and send you over there.

Senator EVANS. But would I be correct in saying that after 4 or 5 years in the Federal court, once you got the judgment, then you would have to start all over again for another 4 or 5 years trying to get the judgment paid?

Mr. ROVINE. Well, I do not know that it would have taken——

Senator EVANS. If you had not had this alternative?

Mr. ROVINE. I do not know that it would take another 4 or 5 years, Mr. Chairman, but in any event, whatever period of time it would take I think in terms of fee charging, you let the claimants decide whether or not they are better off in the one place or the other. If they are not permitted to decide it, if the Government is going to make the judgment for them, then I do not think they should be charged a fee on top of it.

Senator EVANS. In your statement, you mention the claimants who lose their cases. They pay nothing, but often require far more assistance because they have difficult cases.

Is that so unusual? It seems to me that a good many lawyers charge contingent fees. Those who lose do not pay anything; those who win pay a share of the winnings.

Mr. ROVINE. Well, you are right in that sense. What we have here is kind of a gigantic contingent fee operation. Lawyers are very familiar with it. I do not find——

Senator EVANS. They should have no objections to it, should they, being familiar with it?

Mr. ROVINE. Well, our office does. We do not do it.

Senator EVANS. Never?

Mr. ROVINE. It is depressing to me—never—it is depressing to me that the Government does it. In any event, surely those who lose cases require assistance from the Government, and have received that assistance. That is just one illustration among several of why the fee system cannot be matched up with the benefits conferred or the costs—the benefits granted or the costs incurred, as Chief Judge Kozinski said.

Mr. MCKNIGHT. Senator Evans.

Senator EVANS. Yes.

Mr. MCKNIGHT. Perhaps an analogy might be in the Federal system, and indeed in many State systems, where a losing party can be made to pay court costs. In this case, the losing party would not under the proposed legislation. Even though court costs tend to be somewhat nominal, they are not the real costs of litigation, they still are an assessment which is permitted under our court system. But the Government does not recognize that fact in its proposed legislation.

Senator EVANS. Let me ask you, Mr. McKnight, just to be certain I understand your suggestion—that your preference is no fee—but if there is a fee, that it should be applied to the original size of the claim and not to any interest rate or any interest payments or legal fees, or any other payments that are attached to that original claim?

Mr. MCKNIGHT. That is essentially correct, Senator. What I suggest is the amount of the claim as found by the Tribunal. In many instances, particularly in the district courts, claims were filed with punitive damages requests added on. Most of the claims at the Tribunal, have not received punitive damages. The tribunal looks just to the hard numbers. That is the amount I am talking about.

That, it seems to me, is where we can best assess the contribution of the U.S. Government, because the U.S. Government's help is not with respect to the interest or expenses issues, but rather on

the basic claim itself, which is what I think the fee should be based upon if there is a fee at all.

Senator EVANS. You say that there have not been punitive claims assigned yet. Is there still the potential of that happening in front of the Tribunal? It is still possible that they may chose to do so?

Mr. MCKNIGHT. Yes; I believe so, but Mr. Rovine would know better than I whether any punitive damages have been awarded. My understanding is that they have not.

Senator EVANS. They have not? Do you think, Mr. Rovine, that there is any chance of that?

Mr. ROVINE. No punitive damages have been awarded as yet, and I do not expect there to be any. There have been a couple of occasions when attorneys' fees in a very small amount were awarded, but that is about it. I would not look for any punitive damages. There is probably no authority in the Tribunal to award punitive damages.

Senator EVANS. If there were punitive damages, would you include these in the category of interest and legal fees?

Mr. MCKNIGHT. I would, Your honor, because I think that—excuse me, I am more used to the courtroom—Senator. I would categorize that as part of the damages incurred by the claimant that go well beyond his initial monetary out-of-pocket loss.

Senator EVANS. Mr. Dickinson, you had sort of a caveat at the end of your statement: While supporting the legislation, you express your reservation about the wisdom of imposing a user fee. That is kind of both sides of the balance. Are you just saying that by 51 to 49 you come down on the side of a fee in this case? Or would you like to explain a little more your reservation under normal circumstances?

Mr. DICKINSON. Yes; the reservation that we have is that the Congress or the Department of State in this specific instance is calling for a user fee for a class of citizens that are the beneficiaries of a specific treaty that the United States has negotiated; whereas, for many other treaties the United States has negotiated, no such fee has been proposed. I could provide examples. I do a lot of work with the Bilateral Investment Treaty Program that I think your committee is going to be considering soon. I do not think that the Congress or the Department of State is going to call upon the multinational companies that will benefit from that program to bear the cost that the Department of State has incurred.

In this specific instance, the Department of State is trying to quantify a cost which should be borne by those who benefit from this treaty. As a general principle, I think that the Congress and the Department of State should consider that principle very carefully before they decide to implement it in this one instance and perhaps not in others, for example, beneficiaries of various double taxation treaties, one not expected to pay a user fee—I am sure Arthur can give more examples of that type of potentially discriminatory treatment.

Senator EVANS. I might just say in passing, and speaking more generally, you are coming before this committee at a particularly interesting time when we have just concluded a budget deficit reduction package of almost $300 billion over the next 3 years, and I

suspect the Government of the United States is embarking on a direction which over the next few years is much more likely than before to try to attach some rational relationship between cost and benefits on many, many classes of former free users of U.S. governmental services.

Senator Helms.

Senator HELMS. Mr. Chairman, I do not think I have a whole lot of questions.

Do I understand that there are about 4,000 to 4,500 cases?

Mr. ROVINE. There were initially not quite 4,000 cases. I believe the total number, including bank claims, interpretative disputes, and government-to-government claims, was 3,850. My point on that was that if we estimate only 2,000 cases in the Federal courts, the Government should come forward with an analysis of its savings before this bill goes forward.

Senator HELMS. How many are bank claims?

Mr. ROVINE. How many are bank claims? There are a few hundred bank claims.

Senator HELMS. A few hundred. Explain to a nonlawyer what an interpretative dispute is.

Mr. ROVINE. There are cases at the Tribunal which are called "A cases"; that is to say, cases involving the interpretation of the Algiers Accords themselves. Some of them are of great interest to claimants and some are not.

Senator HELMS. Now the bank claims cases, are they bank losses, or a bank representing a client?

Mr. ROVINE. Well, these are primarily loan cases. That is to say, there were two kinds: syndicated loans and nonsyndicated loans. There was an account of some $3.667 billion set up in the Bank of England, Dollar Account No. 1, to handle the syndicated loans. And there was an account, Dollar Account No. 2, of $1.418 billion set up in the Bank of England to handle nonsyndicated loans. And they have been for the most part negotiated and settled, so that there have not had to be trials or hearings at the Iran Tribunal on those cases, fortunately.

Senator HELMS. I wonder if I could ask the chairman a question—and this may not be the time to ask it—but how did you decide on the date of June 7, 1982, for the retroactivity?

Senator EVANS. I think Mr. Rovine touched on it in his testimony, but I guess the best answer is, that catches everybody.

Mr. ROVINE. Yes; that was the date when the—2 percent fee was first imposed by the Treasury Department.

Senator HELMS. OK.

Senator EVANS. So it would provide uniform treatment of everybody.

Senator HELMS. I see. Well, I have the same feeling that has been expressed here about retroactive assessments or fees, but I thank you, Mr. Chairman, and thank you, gentlemen.

Senator EVANS. Thank you.

Thank you all, gentlemen. It has been very helpful, and I think we got some new ideas, particularly, from Mr. McKnight, some of which may find its way into any proposed legislation.

Mr. MCKNIGHT. Thank you, sir.

Senator EVANS. Thank you very much.

Mr. ROVINE. Thank you.

Senator EVANS. The hearing is adjourned.

[Additional questions and answers follow:]

STATE DEPARTMENT'S RESPONSES TO ADDITIONAL QUESTIONS SUBMITTED FOR THE RECORD

Question 1. If S. 1166 is adopted, how much money will be refunded to small claimants as a result of lowering the fee from 2 percent to 1½ percent?

Answer. Approximately $26,000 would be returned to the 10 small claimants who, to date, have received awards paid from the Security Account.

Question 2. Please identify for the record all individual or corporate claims in excess of $5 million.

Answer. This is difficult to do for several reasons. Many of the statements of claim do not specify an amount demanded or they state it in terms of a specified principal amount plus interest and other fees to be assessed by the Tribunal. Moreover, some claimants amend the amount sought in their statements of claim as the claim reaches the hearing stage. In any event, many claimants strongly prefer to avoid public identification, at least until their claims have been resolved. We can say that the largest claims tend to be brought by five categories of claimants: (1) major oil companies, (2) high technology manufacturers, (3) major defense contractors, (4) joint venturers with Iranian companies, particularly in the construction sector, and (5) American nationals who were also Iranian nationals with large commercial and property holdings in Iran.

Question 3. Please identify for the record all individual and corporate claims which have resulted in awards in excess of $5 million.

Answer. The following claimants have received awards in excess of $5 million: Pfizer, Inc.; Williams Brothers International Corp.; Esso Africa, Inc.; ITT Industries; R.J. Reynolds Tobacco Co.; E.R. Squibb & Sons, Inc.; Timber Purchase Co.; E-Systems, Inc.; Reading & Bates Corp.; E.I. DuPont De Nemours & Co.; Tippetts, Abbett, McCarthy & Stratton; Electronic Data Systems Corp.; Singer Co.; Keevan D. Morgan; Zerox Corp.; General Motors; American International Group, Inc. and American Life Insurance Co.

Question 4. Please identify the amount which will be refunded to claimants with respect to awards in excess of $5 million if S. 1166 is adopted.

Answer. The refund to recipients of awards above $5 million to date would be approximately $2 million. The total refund to all claimants with awards to date would be approximately $2.4 million.

Question 5. What percentage of annual costs have been recovered up to now by fees collected from awards?

Answer. Based on a fee of 2 percent, the United States has recovered $6.86 million from the $343 million awarded to date. During this same period, the United States has contributed approximately $8 million to the Tribunal and paid approximately $3.6 million in fees for maintenance of the Security Account. Thus, the 2-percent fee has covered a little more than one-half of these fixed costs. (Another way to look at this is that the fees deducted to date covered only the costs of maintaining the Security Account and about one-third of the costs of the Tribunal.) Under S. 1166, the Government would recover about one-third of its costs for maintaining the Tribunal and the Security Account. In addition, the Government, through the Departments of State, Treasury and Justice, expends substantial sums for salaries and other personnel costs to assist the private claimants. For example, the Department of State estimates that, to date, it has expended approximately $3 million to assist private claimants in addition to fixed expenses of the Tribunal and the Security Account.

Question 6. What do you estimate will be the total U.S. monetary contribution over the life of the Tribunal?

Answer. The Department of State estimates that its expenses with respect to the Tribunal, including annual contributions to the Tribunal (unless there is agreement to increase the number of arbitrators and staff) and fees for the Security Account, are likely to remain relatively constant at about $4 million. The total of U.S. Tribunal-related expenses therefore depends on the life of the Tribunal, which is difficult to project. Approximately one-third of the "large" claims have been resolved to date; if settlements and adjudications continue at the same rate, the large claims could be completed in 6 more years. It could take an additional 3–15 years to complete the arbitration of the remaining 2,700 small claims if no *en bloc* settlement is concluded.

Question 7. The trigger for replenishment of the Security Account is that point when the Account drops below $500 million. When do you expect that point to be

reached? What happens to the work of the Tribunal if the Account is not replenished?

Answer. Of course, we expect Iran to live up to its replenishment obligations. But even if it does not, there will still be substantial resources for payment of Tribunal awards to U.S. claimants. The pace and size of Tribunal awards will determine when the Security account reaches the replenishment point. If past patterns hold, that point may be reached in late 1985 or early 1986. At that point, even if Iran does not contribute new funds to the Security Account, the accumulated interest on the Security Account (which now totals $487 million) may be used for this purpose. If that occurs, and no further replenishment is made after the exhaustion of the accumulated interest, awards would be paid from the remaining $500 million. Of course, we (and possibly claimants) would take appropriate action to enforce the replenishment obligation. Moreover, the Accords expressly provide that, if Iran fails to replenish once the Security Account is depleted, awards issued by the Tribunal are enforceable in the courts of any country in accordance with its laws. In any event, the Tribunal will continue to operate until all of its cases are resolved, whatever Iran does with respect to replenishment.

Question 8. How many awards have been made to date by the Tribunal and what has been the average size of the award?

Answer. The Tribunal has issued more than 200 partial and final awards, of which 120 direct payment to U.S. nationals from the Security Account, for a total of $343 million, or on average $2.8 million.

Question 9. How does the record of the Tribunal compare to that of other foreign claims commissions in terms of the rate at which awards have been achieved?

Answer. Although the rate of awards has been frustratingly slow, largely due to Iranian intransigence, in historical terms it is at or above average. In three years of active adjudication of claims, one-third of the large claims have been resolved, the majority as the result of settlements (or in the Tribunal's lexicon, awards on agreed terms). By contrast, several similar tribunals have taken many years to resolve a much smaller percentage of the pending claims, and many have ceased operation before resolving even a small fraction of the claims submitted. [For example, in its 7 years of operation, the United States-Mexican General Claims Commission, established in 1923 to consider all claims of citizens of either country against the other (except those arising from the Mexican Revolutions of 1910 and 1920), resolved 139 of the 2,781 claims of U.S. nationals filed with it.] The resolution of the small claims has been exceedingly slow, but the pace promises to improve with the scheduling of hearings in individual small claims starting this fall and winter. Nonetheless, we anticipate that the small claims will not be fully resolved for many years unless an *en bloc* settlement can be negotiated.

Question 10. Should a fee be assessed against unsuccessful, as well as successful, claimants?

Answer. The Administration does not believe that it is unfair only to charge successful claimants. A fee charged to unsuccessful claimants, if more than a nominal amount, would deter some claimants (in particular the small claimants) from asserting claims. This is contrary to the essential purpose of the Algiers Accords to provide a forum for the resolution of claims of *all* U.S. nationals against Iran of any size. For this reason, the Department also opposes a fixed fee without respect to the size of the claim or award, but rather believes that the fee should be no more than a small proportion of the amount ultimately recovered with respect to any one claim.

Question 9. Please provide for the record a chronological list of awards made by the United States-Iran Claims Tribunal to U.S. claimants by name of claimant. Also include if available a breakdown of amount of award which was principal and that which was additional interest or expenses awarded by the Tribunal.

Answer. The list requested is attached hereto. As you will note, there are a large number of awards in which the Tribunal did not specify principal and interest amounts.

Award No.	Parties	Date	Award
1-8-2	B.F. Goodrich	April 28, 1982	PA/AAT—$182,249.87
2-373-2	Aeromartime Inc.	May 17, 1982	D/J (corp. nat.).
3-171-2	Singer Co.	do	AAT—$281,056.0.
4-122-3	Int'l Schools Services, Inc.		AAT—$81,492.53. May 25, 1982.
5-5-3	Daniel, Mann, Johnson & Mendenhall	June 11, 1982	AAT—$420,000.
6-186-2	Air La Carte Inc.	June 15, 1982	AAT—$416,084.99.

Award No.	Parties	Date	Award
7-14-3	White Westinghouse Int'l Co	June 25, 1982	C—$298,757.45 + 6 percent (interest from Feb. 2, 1980) to (June 24, 1981) and 9 percent interest from June 25, 1981 equals) $51,261.79.
8-31-2	Honeywell Information Systems Inc	July 14, 1982	AAT—$800,000.
9-30-3	Granite State Machine Co	July 30, 1982	PA/C—$368,969.86 (Tribunal retained jurisdiction over questions of interest and costs).
10-205-2	Sperry Corp, Sperry World Trade Inc	Sept. 14, 1982	AAT—$2,800,000.
11-95-3	Phillip Morris Inc	Sept. 21, 1982	AAT—$2,000,000.
12-281-3	General Atomic Co	Sept. 30, 1982	D/J (corp. nat.).
13-119-1	NCR Corp. (MK-c/d, Nov. 19, 1982)	Nov. 17, 1982	AAT—$250,000.
14-8-2	B.F. Goodrich	Dec. 2, 1982	AAT—$554,552.31.
15-90-2	Reliance Group Inc	Dec. 8, 1982	D/J (corp. nat.).
16-342-3	Sundstrand Data Corp	Dec. 10, 1982	AAT—$123,650.
17-143-1	The Continental Corp. (MK-c/d, Dec. 10, 1982).	do	AAT—$360,000.
18-30-3	Granite State Co. Inc., (JS-d, Jan. 14, 1983), (RM-c, Jan. 25, 1983).	Dec. 15, 1982	C—Final award $25,000 in costs, (interest at 12 percent equals $125,433.53).
19-98-2	Harza Engineering Co	Dec. 30, 1982	D/M.
20-17-3	Raygo Wagner Equipment (JS-d, Feb. 3, 1983), (RM-c, Mar. 3 1983), (JS-reply to Mosk's comments of March 3, Apr. 7, 1983), (RM-further comments Apr. 13, 1983).	Dec. 15, 1982	C—$220,848 (plus interest at 12 percent from January 1979 equals $102,189.07).
21-132-3	Rexnord, Inc. (RM-c, Apr. 13, 1983) (JS-d, Apr. 7, 1983).	Jan. 10, 1983	C—$1,132,082. Total award including interest (pursuant to English law; at prevailing commercial rates at the time the unpaid drafts fell due), and costs ($25,000).
22-495-2	Hoffland Honey Co	Jan. 26, 1983	D/J.
23-428-2	Mr. K. Haji Bagherpour	do	D/J.
24-808-3	E.R. Squibb & Sons, Inc	Feb. 4, 1983	PA/AAT—$7,350,000.
25-71-1	Lillian Byrdine Grimm (HH-d, Mar. 22, 1983).	Feb. 22, 1983	D/J.
26-206-2	Pfizer Inc	Feb. 23, 1983	AAT—$7,624,300.
27-84-3	Ultrasystems Inc. (RM-c, Mar. 4, 1983).	Mar. 4, 1983	PA/C—$361,136.92 (includes interest of $95,000 and costs of $70,000).
28-307-3	Gulf Ports Crafting Co	Mar. 9, 1983	AAT—$1,600,000.
29-92-1	General Electric Co	Mar. 14, 1983	AAT—$2,700,000.
30-16-3	Raygo Wagner Equipment Co. (RM-c/d, Mar. 25, 1983).	Mar. 18, 1983	D/M.
31-157-2	Nasser Esphahanian (SS-d, Oct. 12,	Mar. 29, 1983)	C—$704,691.85 (plus interest at 8 percent from Jan. 10, 1979 equals $249,774.11).
32-211-2	Ataollah Golpira (SS-d, Oct. 12, 1983). See Award 31-157-2.	do	D/M.
33-418-2	Paridokht K. Haroonian	Mar. 29, 1983	D/J.
34-26/27-2	Williams Bros. Int'l Corp	Mar. 30, 1983	ATT—$5,950,000.
35-219-2	Benjamin R. Isaiah	do	C—$380,000.
36-200-1	Henry Morris (Decision, Sept. 16, 1983).	Apr. 12, 1983	D/M.
37-172-1	Queens Office Tower Associates (HH-d, May 10, 1983).	Apr. 15, 1983	D/M.
38-291-3	Warner Lambert Company	Apr. 19, 1983	AAT—$3,642,870.
39-145-2	American Cyanamid Co	Apr. 27, 1983	AAT—$2,154,337.
40-230-2	Foremost McKesson, Inc	do	AAT—$339,000.
41-91-3	Alcan Aluminum Limited (RM-c, May 4, 1983).	May 3, 1983	D/J.
42-105-2 137	Dresser Industries, Inc	do	AAT—$2,100,000.
43-189-3	French American Banking	May 5, 1983	D/J.
44-151-3 152 153	Esso Africa Inc	do	AAT—$5,400,000.

45-70-1	Upjohn Company	May 24, 1983	AAT—$1,050,000.
46-57-2	Kimberly-Clark Corp. (SS absence of signature, May 27, 1983).	May 25, 1983	C—$356,164 (plus interest at 12 percent from September 1978 equals $151,063.74).
47-156-2	ITT Industries, Inc. (GA-c, May 26, 1983); (Shafeiei note on GA concurring opinion, Aug. 19, 1983).	May 26, 1983	AAT—$6,150,000.
48-19-1	Chevron Research Co. (HH-c, June 20, 1983).	June 1, 1983	AAT—$1,501,862.
49-228-1 229	Kaiser Engineers Int'l.	June 2, 1983	AAT—$428,199.
50-40-3	R.N., K.S., & R.M. Pomeroy (RM-c, June 13, 1983); (JS-d, Dec. 23, 1983).	June 8, 1983	C—$2,980,241.09 (includes interest of $850,000 and costs of $25,000).
51-41-3	Pomeroy Corp.	do	C—$362,736.55 (includes interest of $100,000 and costs of $5,000).
52-125-3	Deloitte, Haskins & Sells.	June 10, 1983	AAT—$270,000.
53-149-1	Mark Dallal (HH-d, July 27, 1983); (Decision, Jan. 12, 1984).	do	D/M.
54-387-1	Carrier Corp., & Overseas Private Investment Corp. (HH-c, June 20, 1983).	do	AAT—$3,000,000.
55-165-1	Economy Forms (HH-c, June 20, 1983); (MK-d, Feb. 8, 1984).	June 14, 1983	C—$1,516,000 (includes costs and unspecified amount of interest).
56-15-1	VSI Corporation (HH-d, June 20, 1983).	June 15, 1983	AAT—$835,000.
57-244-1	J.I. Case Co. (HH-d, July 27, 1983).	do	D/M. Note: Part of the award was denied on jurisdiction.
58-449-3	National Airmotive Corp. (Reason for absence of Shafeiei signature, Aug. 9, 1983); (GA comments on Shafeiei nonsignature, Oct. 13, 1983).	July 14, 1983	AAT—$553,894.24.
59-220-2	Intrend Int'l. Inc. (Reason for absence of Shafeiei signature, Aug. 9, 1983); (GA comments on Shafeiei nonsignature, Oct. 13, 1983). See Award 58-449-3.	July 27, 1983	C—$208,263.51 (plus interest at 12 percent from Sept. 15, 1977 and interest at 12 percent from Sept. 14, 1978 equals $140,619.38).
60-83-2	Reynolds Metals Co. (Reason for absence of Shafeiei signature, Aug. 9, 1983); (GA comments on Shafeiei nonsignature, Oct. 13, 1983). See Award 58-449-3.	do	AAT—$367,900.
61-188-2	Gruen Associates, Inc. (Reason for absence of Shafeiei signature, Aug 9, 1983); (GA comments on Shafeiei nonsignature, Oct. 13, 1983). See Award 58-449-3.	do	C—$500,000 (includes interest).
62-482-2	Timber Purchase Co.	Aug 8, 1983	AAT—$6,000,000.
63-279-1	A.B.S. Worldwide Technical Services, Inc. (HH-c, Oct. 10, 1983.	Aug. 12, 1983	AAT—$260,000.
64-807-1	Proctor & Gamble Co. (HH-c, Oct. 10, 1983. See Award 63-279-1.	do	AAT—$220,000.
65-427-1	Goodyear Tire & Rubber Co. (HH-c, Oct 10, 1983). See Award 63-279-1.	do	AAT—$400,000.
66-764-1	World Farmers Trading Inc. (HH-c, Aug. 16, 1983).	Aug. 16, 1983	PA—D/J.
67-148-1	Ram Int'l Industries Inc.	Aug. 19, 1983	C—$288,556.46 (includes 15,000 in costs (plus interest at 10 percent from Feb. 2, 1979 and interest at 10 percent from Nov. 16, 1978 equals $126,285.83).
68-103-3 104 107 108 109 110	Dresser Industries, Inc.	Aug. 29, 1983	AAT—$1,692,000.

69-139-3	Gillette Co., et al	Aug. 29, 1983	AAT—$740,000.
70-185-3	Chas. T. Main Int'l, Inc. (RM-c, Sept. 2, 1983).	Sept. 2, 1983	C—$393,340 includes $15,000 in costs (plus interest at 10 percent from Nov. 6, 1979 equals $153,648.08).
71-346-3	Alan Craig (RM-c, Sept. 2, 1983)	do	C—$148,118.40 (includes $10,000 in costs) plus interest at 10 percent from Feb. 1, 1979 equals $66,757.23.
72-124-3	John Carl Warnecke & Associates	do	C—$149,074 (plus interest at 10 percent from Mar. 9, 1978 and Jan. 1, 1979 equals $76,293.03).
73-67-3	Woodward-Clyde Consultants (Decision, Jan. 5, 1984).	do	C—$391,550.06 (includes $25,000 in costs) plus interest at 10 percent from July 1, 1978 equals $199,057.05.
74-62-3	Blount Brothers Corp	do	C—$525,820 (plus interest at 10 percent from Jan. 1, 1979 equals $258,674.23).
75-112-1	Continental Grain Export Corp. (MK-c, Sept. 8, 1983), (HH-c, Oct. 10, 1983.	Sept. 5, 1983	PA—D/J.
76-243-1	Advanced Computer Techniques Corp. and Inter-Act Corp. (HH-c, Oct. 10, 1983).	Sept. 6, 1983	AAT—$323,504.
77-106-2	Dresser Industries Inc	Sept. 2, 1983	AAT—Withdrawn.
78-238-2	United Technologies Int'l	Sept. 9, 1983	D/J
79-B-67-2	Ministry of Roads and Transportation	Sept. 12, 1983	AAT—$3,000,000. Costs against claimant MORT.
80-136-1	General Tire & Rubber Co., et al. (HH-d, Oct. 10, 1983).	Sept. 13, 1983	AAT—$2,420,000.
81-308-2	Combustion Eng. Inc.	Oct 5, 1983	PA/AAT—$615,414.26.
82-489-3	William H. Rorer Inc.	Oct. 21, 1983	AAT—$100,0000.
83-66-1	Stanwick Corporation & Stanwick Int'l Inc.	Nov.4, 1983	PA/AAT—$466,593.24
84-142-3	American Motor Corp.	Nov. 15, 1982	AAT—$2,000,000.
85-441-2	Ray-O-Vac Int'l	Nov. 18 1983	AAT—$1,460,000.
86-177-2	Allis-Chalmers	do	AAT—$1,471,200.
87-101-1	Smith Int'l Inc.	do	AAT—$1,200,000.
88-A/14-2	Ministry of National Defense of the Islamic Republic of Iran.	Dec. 6, 1983	PA—D/J (against respondent FMC corp.).
89-84-3	Ultrasystems (RM-d, Dec. 7, 1983)	Dec. 7, 1983	D/M—$15,000. Final award (to be paid to respondent ISIRAN).
90-96-1	Cabot Int'l Capital Corp & Overseas Private Investment Corp.	Dec. 16, 1983	AAT—$3,035,000.
91-3-3	E.I. Du Pont De Nemours & Company	Dec. 19, 1983	AAT—$42,750,000.
92-293-3	Stone and Webster Overseas	do	AAT—$358,550.
93-2-3	American Int'l Group, Inc. & American Life Ins. Co. (RM-c, Dec. 30, 1983).	do	C—$10,000,000 (plus interest at 8.5 percent from June 25, 1979 equals $3,888,749.99).
94-388-1	E-Systems, Inc.	do	AAT—$6,000,000.
95-28-1	Reading & Bates Corp., Reading & Bates Exploration Co.	do	AAT—$15,000,000.
94-488-1	Pan American World Airways, Inc. & Pan American World Services Inc. (HH-d, Feb. 9, 1984).	do	AAT—$2,100,000.
97-54-3	Dames & More, (RM-d, Dec. 21, 1983), (Decision, Apr. 23, 1985).	Dec. 20, 1983	C—$208,435 (plus interest at 10 percent from Jan. 1, 1981 and interest at 10 percent from Nov. 24, 1978 equals $86,330.30).
98-113-2	Owens Corning Fiberglass.	Dec. 27, 1983	AAT—$200,000.
99-245-2	CMI International Inc.	do	C—$675,000 (includes interest).

100-280-2	Morgan Equipment Co. (GA-d, Dec. 27, 1983).	Dec. 27, 1983	D/M.
101-66-1	Stanwick Corp. & Stanwick Int'l Inc	Jan. 1, 1984	PA/ATT—$3,200,000.
102-11875-1	Shipside Packing Co., Inc. (HH-c/d, Feb. 9, 1984).	Jan. 12, 1984	AAT—$168,000.
103-77-2	Charter (Iran) Petroleum Co	Jan. 16, 1984	AAT—$2,600,000.
104-183-1	Alexander Lyons Lianosoff	Jan. 20, 1984	D/J.
105-B-16-1	Iranian Customs Administration	Jan. 24, 1984	D/J.
106-B-24-1	USA v. GOI (HH-c/d, Feb. 9, 1984)	do	D/J.
107-B-53-1	Department of the Environment of Iran v. USA (HH-c/d, Feb. 7, 1984).	Jan. 25, 1984	C—$218,666.31 (plus 10 percent interest costs against the respondent USA.
108-A-16-FT	GOI v. USA	do	D/J.
582	Bank Mellat v. USA		Withdrawn.
591	do		D/J (referred back to Ch. 2 for further proceedings).
109-328-2	Technology Enterprises, Inc	Jan. 31, 1984	D/J.
110-144-2	Jack and Roxanna MacKay	Feb. 3, 1984	D/M. Note: Part of the award was denied on jurisdiction.
111-10043-2	West Chemical Products	Feb. 16, 1984	AAT—$15,863.57
112-10865-2	Taylor Machinery Co	Feb. 17, 1984	AAT—$50,296.00
113-433-2	Reading & Bates v. Int'l Bank of Iran et al.,	Mar. 2, 1984	AAT Note: Settlement in conjunction with award 95-28-1 (Reading & Bates).
576	GOI et al. v. Chase Manhtn et al.,		
580	Bank Mellat v. Chase Manhtn. et al		
114-140-2	T.C.S.B., Inc. (SS-c/d, Mar. 16, 1984).	Mar. 16, 1984	C—$1,016,127.00 (plus interest at 12 percent from July 20, 1979 equal $579,531.10).
115-928-3	CBA Int'l Development Corp. (RM-d, Mar. 16, 1984).	do	D/J.
116-1-3	William L. Pereira Associates, Iran (RM-c, Mar. 19, 1984).	Mar. 19, 1984	C—$3,906,959 Includes costs of $25,000 (plus interest at 6 percent from May 31, 1983 equal $150,832.90).
117-199-3	American Housing Int'l (RM-d, Mar. 19, 1984).	Mar. 19, 1984	D/M.
118-434-3	TWA	Mar. 22, 1984	AAT—$500,000.
119-138-1	Herman Blum	Apr. 11, 1984	AAT—$260,000.
120-B-56-1	Telecommunication Co. of Iran	Apr. 13, 1984	D/M.
121-201-1	Adams Int'l	do	AAT—$470,000.
122-38-3	Schering Corp. (RM-c, Apr. 18, 1984)	Apr. 16, 1984	C—$408,452.37 (plus 10 percent interest from Dec. 1, 1979 equal $183,803.57).
123-283-3	General Dynamics Corp	do	C—$242,980.98 includes costs of arbitration (plus 10 percent interest from Oct. 1, 1975 equal $146,309.55).
124-51-2	Halliburton Co	Apr. 27, 1984	AAT—$2,955,000.
125-79-3	Sohio-Iran Trading Inc	May 3, 1984	AAT—$1,300,000.
126-926-1	David Mikhael Inc	May 4, 1984	AAT—$470,000.
127-257-1	Dow Chemical Co. (HH-c, May 8, 1984).	May 8, 1984	AAT—$2,907,000.
128-B-29-1	USA v. Iran	May 16, 1984	C—$9,344.23 (plus interest at 10 percent from May 18, 1979 and $4,980.21 plus interest at 10 percent from Oct. 27,1979).
129-63-2	Blount Brothers Corp	June 6, 1984	AAT—$172,000.
130-436-1	Procon Int'l Inc	June 6, 1984	AAT—$920,000.
131-267-1	M&M Products,	June 7, 1984	C—$2,000. Costs against Claimant.
132-B-7-1	AEOI V. USA	June 8, 1984	PA/C—$7,933,951.04 Costs against Respondent USA.
133-340-3	Cal-Maine Foods, Inc. (RM-c, June 11, 1984 (PA-c/d, July 24, 1984).	June 11, 1984	C—$496,630.01

134-806-2	Norton Lilly	June 13, 1984	AAT—$390,000.
135-33-1	Sea-Land Services, Inc	June 22, , 1984	C—$750,000.
136-49/50-2	Gould Marketing, Inc. (SS-c/d, June 29, 1984).	June 29, 1984	C—$3,640,247.13 Costs against Claimant Gould.
137-312-2	Rondu Holdings Inc	do	D/J.
138-82-2	William Bikoff & George Eisenpresser	do	D/J.
139-166-2	Time, Inc	do	C—$843,779 (plus interest at 12 percent from Mar. 10, 1979 equal $524,334.82).
140-194-2	Lischem Corp., Gifted, Inc	do	C—$630,000 (plus interest at 12 percent from Nov. 15, 1979 equal $433,230).
141-7-2	Tippetts, Abbett, McCarthy & Stratton (Shafei Shafeiei's absence of signature)	do	C—$5,594,405.00 (plus interest at 12 percent from Mar. 1, 1980 equal $2,966,899.45)
142-100-3	Hood Corp. (RM-d, July 16, 1984)	July 13, 1984	D/M.
143-127-3	Morrison-Knudsen	do	C—$1,371,541.20 and $25,000 in costs; (plus interest at 10 percent) equal $550,230.18.
144-180-3	Harnischfeger Corp	do	PA/C—$1,849,140.91 and $529,745.81 (plus interest at 10 percent); and $73,916.67 (plus interest at 9 percent) Total interest amount equal $618,070.27.
145-35-3	R.J. Reynolds (RM-c, Aug. 6, 1984)	Aug. 6, 1984	PA/C—$36,294,667.66 (plus interest at 13.54 percent) $13,490,757 and $25,000 in costs.
146-42-3	United Technologies Int'l	do	AAT—$750,000.
147-94-1	General Motors	Aug. 28, 1984	PA/AAT—$20,000,000.
148-130-SC	Chicago Bridge & Iron Co	Sept. 21, 1984	PA/AAT—$1,130,000.
149-360-SC	General Electric	do	ATT—$1,125,000.
150-32-SC	Xerox Corporation	do	ATT—$12,000,000
151-344/A9-SC	Singer Co (Amendment to AAT)	Apr. 19, 1985	AAT—No payment from security account.
152-772-SC	Electronic Data Systems Corp	Dec. 17, 1984	AAT—$7,100,409.20.
153-11614-SC	Eorele Tanning Co	do	AAT—$117,705.
154-233/422-SC	Intercontinental Hotels Corp. & OPIC	Dec. 19, 1984	AAT—$1,940,000.
155-11815-SC	Synalloy Corp.-Blackman Uhler Chemical Division.	Dec. 20, 1984	AAT—$10,773.
156-102-SC	American Hospital Supply	Dec. 21, 1984	AAT—$1,100,000.
157-87-SC	National Corp. for Housing Partnerships	do	AAT—$1,760,000.
158-1150-SC	J.D. Marshall Int'l. Inc	Jan. 15, 1985	AAT—$41,557.
159-12701-SC	E.D. Allmendinger Division	Jan. 22, 1985	AAT—$66,890.
160-423-SC	Minnesota Mining & Manufacturing Co	do	PA/AAT—$53,196. Converted into U.S. dollars = $59,659.31.
161-343/365-2	Singer Co	Jan. 29, 1985	AAT—$9,000,000. Costs against Claimant Singer Co.
162-763-3	Manuchehr Haddadi (CB-c, Jan. 31, 1985).	Jan. 31, 1985	D/J.
163-949-3	Mohammad Moussavi	do	D/J.
164-11553-1	A.E. Staley Manufacturing Co	Feb. 12, 1985	AAT—$22,196.
165-341-1	Western Dynamics Corp	Feb. 28, 1985	D/J.
166-35-3	R.J. Reynolds Tobacco Co	Mar. 1, 1985	C—(final award) $12,412,746.51 remaining interest due.
167-446-2	Enserch Corporation	Mar. 11, 1985	AAT—No payment from security account.
168-254-3	Keevan D. Morgan	Mar. 13, 1985	ATT—$6,527,000.
169-10047-1	Detroit Parts Manufacturing Co	Mar. 15, 1985	AAT—$5,486.
170-311-3	Enserch Service Co., of Iran	Apr. 1, 1985	AAT—No payment from security account.
171-10719-2	U.S. Medical Export Co., Inc	Apr. 4, 1985	AAT—$35,554.
172-B-3-3	Iran Customs Administration	Apr. 17, 1985	D/J.

173-B-21-3	Iran Customs Administration	Apr. 17, 1985	D/J.
174-320-1	Cross Company	Apr. 18, 1985	AAT—$415,765.76.
175-180-3	Harnischfeger Corp. (RM-d, May 3, 1985).	Apr. 26, 1985	C—Final award each party to bear own costs.
176-255-3	Dic of Delaware, Inc., Underhill of Delaware, Inc.	do	C—$3,567,670 and $25,000 in costs (plus interest at 8 percent and 10 percent equal $2,339,143.19).
177-389-2	Westinghouse Electric Corp	May 10, 1985	PA/AAT—$4,867,456.
162-763-3	Manuchehr Haddadi (CB-c, Jan. 31, 1985).	Jan. 31, 1985	D/J.
163-949-3	Mohammad Moussavi	do	D/J.
164-11553-1	A.E. Staley Manufacturing Co	Feb. 12, 1985	AAT—$22,196.
165-341-1	Western Dynamics Corp.	Feb. 28, 1985	D/J.
166-35-3	R.J. Reynolds Tobacco Co.	Mar. 1, 1985	C—(final award) $12,412,746.51 remaining interest due.
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173-B-21-3	do	do	D/J.
174-320-1	Cross Company	Apr. 18, 1985	AAT—$415,765.76.
175-180-3	Harnischfeger Corp. (RM-d, May 3, 1985).	Apr. 26, 1985	C—Final award each party to bear own costs.
176-255-3	Dic of Delaware, Inc., Underhill of Delaware, Inc.	do	C—$3,567,670 and $25,000 in costs (plus interest at 8 percent and 10 percent equal $2,339,143.19).
177-389-2	Westinghouse Electric Corp	May 10, 1985	PA/AAT—$4,867,456.

Index to Final Tribunal Awards:
C = Contested
D/J = Denied on Jurisdiction
D/M = Denied on Merits
P/A = Partial Award
AAT = Award on Agreed Terms
W = Withdrawn
c = concurrence
d = dissent

Arbitrators:
HH = Howard Holtzmann
GA = George Aldrich
RM = Richard Mosk
JS = Jahangir Sani
SS = Shafei Shafeiei
MK = Mahmoud Kashani
WR = Willhem Riphagen
GL = Gunnar Lagergren
NM = Nils Mangard
PAM = Paviz Ansari Moin
CB = Charles Brower

Total awarded U.S. claimants:

	Total as of May 30, 1985.
AAT—Award amount	$228,552,320.28
C—Award amount	79,865,725.20
Interest amount	40,079,008.59
Total	348,497,054.07

Question 12. Please provide your assessment as to the workability of charging a fee on only the principal amount of the award and not on any additional interest or expenses.

Answer. The Administration does not believe that the fee should be assessed only on the principal amount of the award, without deducting any fee from interest or other amounts awarded by the Tribunal. First, the entire amount (principal plus interest and costs, if any) is paid from the same Security Account pursuant to a Tribunal award; thus they each bear the same relationship to the expenses borne by the United States. Indeed, the U.S. Government has and will continue to expend substantial resources defending against Iran's challenge claimant's right to be awarded interest from the Security Account. Second, this proposal poses potential administrative difficulties in those not-infrequent cases where the Tribunal awards a single dollar amount without separately specifying how much represents principal and how much represents interest. Further, it would unfairly allow those claimants who obtain settlements with Iran to reduce their share of the fee by simply characterizing an excessively large portion of the award as interest or other fees, thereby reducing the amount of "principal" to which the fee would apply. Finally, the proposal ignores the fact that the benefits received by claimants in obtaining the award and payment of interest and other fees from the Security Account are identical to the benefits received from payment of the principal amount. In our view, there is no basis to exempt interest or other costs awarded from the fee proposed in either S. 771 of S. 1166.

Question 13. What precedent exists for passing legislation to charge fees on a retroactive basis? What would be the problem of making fees only applicable to awards from the date of enactment of legislation?

Answer. While the proposed legislation would be effective as of June 1982, thus retroactively ratifying the recovery of a portion of the Government's expenses, S. 771 and S. 1166 cannot properly be characterized as retroactive in the sense of imposing a fee or tax without notice or fair warning. Proposed legislation virtually identical to S. 771 was first introduced in the 97th Congress in 1982 and again in the 98th Congress. Both S. 771 and S. 1166 effectively ratify in whole or in part the deductions made from awards pursuant to the Treasury Department's Directive License issued on June 7, 1982. Moreover, the Administration's intention to seek reimbursement for Tribunal-related expenses from awards has been publicly known since at least August 1981, some 5 months *before* the filing data for private claims. The Treasury Department's Directive License was issued just before payment of the first award and substantially before all other awards were issued and paid. Thus, claimants have been able to adjust their affairs and decide whether to pursue their claims in the Tribunal and/or settle their claims with Iran with full, advance knowledge of the possibility that a small percentage of any award might be deducted to reimburse the Government for Tribunal-related expenses. To this extent, therefore, the proposals are not truly retroactive but merely ratify an on-going fee system.

There is longstanding precedent that Congress may impose a tax or fee "retroactively." Indeed, a witness who testified in opposition to S. 771 and S. 1166 at the May 20 hearing expressly stated that the imposition of taxes and fees retroactively "is permissible as a matter of law." Having conferred with the Justice and Treasury Departments, we are not aware of any reasonable basis for challenging the lawfulness of the "retroactivity" of S. 771 or S. 1166.

Legislation making the fee applicable only to awards rendered after its date of enactment would plainly be unfair. It would reward those claimants who were fortunate enough to have their claims heard first and penalize those who have had to wait a number of years for the Tribunal to act on their claims, in effect requiring them to shoulder a greater burden. It would be especially unfair to the small claimants, since the resolution of their claims have been delayed by Iranian intransigence and preference to focus on the resolution of the larger claims.

Question 14. If this legislation is enacted, will the Foreign Claims Settlement Commission be able to begin work on sorting out the validity of the various small claims even before agreement on any lump sum settlement? Will this expedite receipt of awards by small claimants? In the absence of work already done by the U.S. Iran Claims Office in the State Department how long would it take the Foreign Claims Commission to do its work?

Answer. Neither S. 771 nor S. 1166 authorizes the Foreign Claims Settlement Commission to pre-adjudicate the small claims. Rather, the Commission's authority would be triggered by an *en bloc* settlement between the two governments. While pre-adjudication might expedite payment of awards to small claimants upon settlement and receipt of funds, it often hampers negotiations and thereby could preclude

the receipt by claimants of the full amount awarded them. In our view, parallel adjudication of the claims in the Commission and the Tribunal would simply be duplicative and expensive, with potentially inconsistent results.

Nonetheless, the work done by the State Department in gathering evidence and preparing claims will considreably reduce the amount of work that the staff of the Foreign Claims Settlement Commission will have to do if a lump sum settlement is successfully negotiated. Given the work already accomplished, the Commission believes that it could complete adjudication of the small claims within 2 years of a settlement.

Question 15. Without legislation, and in the event of a lump sum settlement how would the U.S. Government make awards to the 2,800 small claimants?

Answer. If neither S. 771 nor S. 1166 is enacted, there are two possible ways of resolving the small claims in the event of an *en bloc* settlement with Iran. The Secretary of State has authority under 22 U.S.C. § 2668a to determine the validity of claims against foreign governments which the United States has espoused, and not infrequently does so pursuant to lump sum settlements. In this case, however, resolution of such a large number of claims under this authority would pose serious resource problems, since the State Department has neither the necessary staff nor structure to properly adjudicate them expeditiously. More importantly, there may be the appearance of a conflict in having the Department, which has prepared and documented the claims, adjudicate their validity.

The second possibility is to obtain legislation like that now proposed in section 2 of S. 771 and S. 1166 following the *en bloc* settlement. An amendment to the International Claims Settlement Act of 1949 would be essential to broaden the Foreign Claims Settlement Commission's jurisdiction to include all the types of claims filed at the Tribunal, since its present statutory authority is limited to claims "arising out of the nationalization or other taking of property" of U.S. nationals (which is narrower than that of the Tribunal jurisdiction including claims arising out of debts and contract). It is, however, much preferable to obtain such legislation prior to the negotiation of any settlement. It strengthens our bargaining position, ensures that the settlement agreement will be consistent with the Commission's statutory authority, and expedites resolution of the claims following the settlement.

Question 16. In adjudicating past claims by U.S. nationals against various foreign governments, on average, how long has it taken for the Foreign Claims Settlement Commission to complete its work?

Answer. In general, the time within which the Foreign Claims Settlement Commission adjudicates claims is prescribed by the statute authorizing the adjudication. The various programs have taken between 3 and 4 years, including a year for filing claims. The Iranian claims program would take less time because there would be no need for a lengthy filing program and because much of the preliminary gathering of information has already been done by the State Department.

Question 17. During the hearing on May 20 before the Foreign Relations Committee, one witness argued that U.S. commercial banks were treated more favorably under the Algiers Accords than other classes of claimants since they were not charged any fee for settlement of their claims against Iran. How do you respond to this charge?

Answer. Under either S. 771 or S. 1166, all U.S. claimants whose claims are resolved by an award from the Tribunal and paid from the Security Account will be charged a fee. If U.S. banks receive such awards, they will be charged the fee.

On the other hand, with few exceptions, claims of U.S. banks against Iran arising out of syndicated and non-syndicated loans to Iranian entities are not paid from the Security Account, but rather from special escrow accounts (Dollar Account Nos. 1 and 2) available only for the resolution of specified categories of bank claims.

As contemplated when the Accords were written, the resolution of those bank claims does not require U.S. Government participation or expense. First, the bank settlements paid from Dollar Account Nos. 1 and 2 are not submitted to the Tribunal for resolution and take up little—if any—Tribunal time and resources. Second, while the United States must pay half of the management fees for the Security Account, the accounts from which bank settlements are paid are self-sustaining. Thus, the expenses incurred by the Government with respect to the Tribunal and the Security Account cannot fairly be charged against U.S. banks receiving payment from Dollar Accounts Nos. 1 and 2. However, it is true that a number of U.S. banks did file "contingency" claims at the Tribunal in order to protect themselves against the possibility that they could not reach a settlement with Iran or that Dollar Account Nos. 1 and 2 might be depleted. Should the Tribunal adjudicate their claims and order payment out of the Security Account, those banks would be subject to the legislation.

Question 18. An assertion has been made that the charging of fees by the U.S. Government violates the provisions of the Accords which provide for expenses of the tribunal to be shared equally by the Governments of Iran and the United States. How do you respond to this assertion?

Answer. While the Accords do provide that the governments will share equally the costs of the Tribunal, they do not address, let alone limit, the source of the governments' payments. Either government remains free to obtain the amount to be paid from any legitimate source or through any legitimate method. Thus, S. 771 or S. 1166 would not violate the Accords.

Question 19. Absent legislation, is there any way in which the U.S. Government might impose a fee which would stand the challenge of the U.S. Claims Court?

Answer. In light of Chief Judge Kozinski's statements from the bench in *Sperry Corp.* v. *United States of America*, we believe that it would be difficult for the Government to construct a fee which complied with his interpretation of the Independent Offices Appropriation Act ("IOAA"). First, according to Judge Kozinski, one agency of the Government cannot charge a fee for costs incurred by another agency. Yet several Government agencies incur inter-related costs in providing the Tribunal, the Security Account and other assistance to claimants. Consistent with Judge Kozinski's opinion, each of these agencies would have to charge separately. Second, the fee charged has to be related to the specific costs and benefits provided to each claimant and attributable to each agency. While we can estimate the costs which each agency will incur, and as a general matter the benefits claimants receive, we cannot determine the relationship between the two on an agency-by-agency basis, much less on a claimant-by-claimant basis. Much of the expenses of the U.S. Government agencies are of general benefit to all claimants or classes of claimants, and could not be allocated to particular claimants. As construed by Judge Kozinski, the IOAA simply was not designed to take into account inter-agency initiatives such as the Tribunal.

Moreover, the Algiers Accords themselves complicate the process of complying with Judge Kozinski's view of the IOAA. The Accords were designed to provide a forum for resolution of claims of U.S. nationals, large and small, against Iran. Consistent with this purpose, any fee must be structured so as not to deter claimants from pursuing their claims before the Tribunal. For this reason, the department believes that the fee should be no more than a small proportion of the amount ultimately recovered with respect to any one claim. Under Judge Kozinski's interpretation of the IOAA, this type of fee imposed by an agency is "inherently suspect." Of course, Judge Kozinski was only referring to the validity of the fee structure under the IOAA. He neither addressed not questioned the authority of Congress to set such a fee. Rather, he explicitly stated that Congress had such authority (see, Transcript of May 1 Hearing, at p. 159–60).

Question 20. Is it possible to estimate how much Government revenue would have been expended by the U.S. courts in adjudicating U.S. claims against Iran in the Courts in the absence of the Tribunal? What is the likelihood that even in the event of favorable judgments in U.S. courts, U.S. claimants would have been successful in obtaining funds from Iran?

Answer. It seems unlikely that the U.S. Government, through its judicial branch, would have incurred any substantial additional expenses had the claims against Iran proceeded in U.S. courts instead of at the Tribunal. The costs of maintaining and operating the federal courts are largely fixed and independent of the number of cases pending. Thus, it is doubtful that the influx of 400 or even 2,000 additional cases would have led to the appointment of even a single additional judge or the construction of any new courtrooms. Additional expenses with respect to file management would not have been substantial in amount. (Moreover, even with the existence of the Accords, many claimants have attempted to maintain their litigation in the courts, and some have even pressed for judicial relief notwithstanding the Accords, requiring the judicial and executive branches to expend resources.)

On the other hand, had the Tribunal not been established and had U.S. nationals been been left to proceed in U.S. courts, it is likely that many of them would not have filed claims. This is particularly true of the small claimants, whose claims may not have justified incurring substantial attorneys fees. In addition, of those who did file, it is unlikely that many would have successfully obtained and satisfied judgments against Iran. The validity under the Foreign Sovereign Immunities Act of attachments obtained by some claimants against Iranian Government assets was never fully litigated. Iran had retained the services of competent counsel who were likely to challenge the validity of these attachments and otherwise defend the suits aggressively. Thus, in all likelihood, the claimants would have incurred substantial costs in retaining their attachments and pursuing their claims in U.S. courts, even

greater than they are incurring in the Tribunal. In any event, claimants who had not obtained valid attachments of Iranian assets adequate to satisfy a judgment received from a U.S. court would have had to incur substantial additional costs in finding and executing against foreign-located Iranian Government assets. Under the Accords, all claimants avoid these additional expenses through the existence of the Security Account and the replenishment obligation.

Question 21. What were the legal barriers that U.S. claimants would have faced in attempting to sue the Government of Iran in U.S. courts?

Answer. U.S. claimants would have faced several legal barriers deriving from the simple fact that in all cases the claimants are suing the Government of Iran. As a sovereign, Iran enjoys a certain immunity from suit, and its assets immunity from attachment, under the Foreign Sovereign Immunities Act ("FSIA"). In order to pursue their claims against Iran in U.S. court, claimants would have had to obtain service against Iran or its controlled entities consistent with the FSIA; demonstrate that the substance of the claim fell within the exemptions from immunity set by the FSIA; and meet the requirements of the FSIA with respect to pre-judgment attachment and post-judgment enforcement. Moreover, since many of the claims relate to activities of Iran acting as a sovereign within its own borders, at least some of the claimants would have confronted the potential application of the Act of State Doctrine.

A further legal barrier would have arisen regarding those claims based on contracts which included arbitration provisions, which is true of many of the largest and most complex claims on the Tribunal's docket. If the arbitration provisision were invoked and enforced, the claim would have been removed from U.S. court and submitted to a separate arbitral panel, with the U.S. claimant liable for its portion of the (much larger) costs of that panel.

Question 22. If legislation is not enacted, will the U.S. Government appeal Judge Kozinski's recent decision? How long would you expect it to take for Sperry and other claimants to receive refunds of fees charged in the absence of legislation? How long should refunds take if legislation is enacted?

Answer. Judge Kozinski has not yet issued a written opinion. Any decision on whether to appeal necessarily must await the issuance of the written opinion. In the absence of legislation, the time for refunds will depend on whether the Government appeals Judge Kozinski's decision. If legislation is enacted, refunds could be made expeditiously.

APPENDIX

Stewart Abercrombie Baker
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036

May 23, 1985

The Honorable Daniel Evans
United States Senate
Washington, D.C.

Dear Senator Evans:

I am writing to comment on S.1166. I have represented a large number of claimants before the Iran-U.S. Claims Tribunal. I have also filed three of the four refund suits now pending before the United States Claims Court. I do not claim to speak for this diverse group of past and present clients, but my experience in Iranian claims matters leads me to offer the following personal views.

First, there is no doubt that S.1166 is superior to the Administration's proposal, which would retroactively validate the 2% "skim" that Chief Judge Kozinski has already condemned. But S.1166 can still be improved. In particular, I believe it should authorize deductions only from the "principal" amount of any Tribunal awards and not from Tribunal awards of interest.

Simple fairness requires this change. Most of the claims against Iran arose by 1979, and many were in the U.S. courts by 1980. In 1981, the U.S. government excluded Iranian claims from U.S. courts and remitted them to the Tribunal, which was not sufficiently organized even to approve settlements until 1982. Not until 1983 did the Tribunal issue a significant number of awards in contested cases. And in late 1984, the Tribunal canceled all hearings for several months after two Iranian arbitrators physically attacked a third arbitrator for allegedly favoring American claimants. It is now 1985, and the vast bulk of the Tribunal's cases still have not been scheduled for hearings.

These delays were not the claimants' responsibility. They were the inevitable result of concentrating hundreds of claims from U.S. courts all across the country in a brand-new

tribunal that can hold no more than three hearings at a time. Further delays were guaranteed by the nature of the Tribunal; the Iranian judge serving on each panel is well aware that delay favors the defendant, and he is always alert for opportunities to slow down claimants' cases.

These delays cost claimants dearly. The Tribunal typically awards interest, but its awards rarely match claimants' actual cost of borrowing. S.1166, as it is now drafted, compounds these costs; it deducts the U.S. government's fee from Tribunal awards of interest as well as "principal." This means that the fee increases in direct proportion to the delay the claimant suffers. Those who wait longest for their awards end up paying the most. Since fewer than twenty small claims (out of nearly three thousand) have been scheduled for hearings so far, small claimants will suffer heavily from this practice.

It would be a simple matter to amend S.1166 so that its deduction applies only to the principal amount of the award and not to any award of interest. Requiring a separation of principal and interest will impose no great burden on the Federal Reserve. Tribunal opinions have now fallen into a predictable pattern, and interest is routinely discussed and awarded separately from the underlying claim. (Attachment 1 is a partial list of Tribunal interest awards in past cases.) A simple examination of the opinion accompanying the award will allow the Fed to decide what portion of the award is subject to deduction.

Nor would such an amendment work any unfairness on claimants who receive lower interest awards than others. Some claimants may receive less interest than others because they are paid earlier; they have no cause for complaint. There are no wide disparities in the Tribunal's practice concerning awards of interest. As the head of the State Department's Iranian claims office noted in 1983, only very rarely has the Tribunal refused to award interest to a successful claimant. D. Stewart and L. Sherman, Developments at the Iran-United States Claims Tribunal: 1981-1983, 24 Va. J. Int'l. L. 1, 35 (1983). If the claimant's contract or the applicable law sets an interest rate, the Tribunal uses that rate. If not, the Tribunal usually chooses a "reasonable" rate. As Attachment 1 shows, this rate has almost always been 10% or 12%.

The only serious risk that this proposal would result in inequalities between claimants comes in connection with settlements and the occasional contested awards that do not clearly separate interest from principal. Settlement talks always include interest, and interest liability is considered

by both sides in evaluating settlement offers. However, because settlements are compromises, and because Iran is reluctant to acknowledge liability for interest, settlement agreements do not identify part of the compromise as interest and part as principal. This does not mean that those who settle their cases and reduce the burden on the Tribunal and the U.S. government should be penalized by the unrealistic assumption that their awards contain no interest element.

At the same time, the method of allocating settlement awards between interest and principal should be simple and conservative. In fact, a simple method exists.

Every claim before the Tribunal must, as a matter of jurisdiction, have arisen no later than January 19, 1981. This fact, combined with the Tribunal's past practice in awarding interest, makes it reasonable to assume that settlements include an interest component running at least from January 19, 1981 until the date of payment at approximately 12% a year. This assumption may understate the interest component of some settlements, but it has the advantage of relatively easy administration. No individualized inquiries into settlement negotiations would be required. The Fed could perform the necessary calculation in minutes.

Attachment 2 to this letter is a suggested amendment showing how S.1166 could be revised to incorporate this change. I urge you to do so.

Very truly yours,

Stewart Abercrombie Baker

Attachments

ATTACHMENT 1
TO LETTER OF STEWART ABERCROMBIE BAKER
TRIBUNAL INTEREST AWARDS

Case Name	Amount of Interest Awarded
White Westinghouse Int'l Co. and Bank Sepah-Iran, Award No. 7-14-3	Pursuant to New York State court award, 6% for a part of the period, 9% for the remainder.
Granite State Machine Co. and Iran, Award No. 18-30-3	12%
Raygo Wagner Equip. Co. and Star Line Iran Co., Award No. 20-17-3	12%
Rexnord, Inc. and Iran, Award No. 21-132-3	$275,000 (roughly 12-15%)
Esphahanian and Bank Tejarat, Award No. 31-157-2	8%
Kimberly-Clark Corp. and Bank Markazi Iran, Award No. 46-57-2	12%
Pomeroy and Iran, Award No. 50-40-3	$850,000 (on an award of $2,105,241)
Pomeroy Corp. and Iran, Award No. 51-41-3	$100,000 (on an award of $257,000)
Economy Forms Corp. and Iran, Award No. 55-165-1	$1,500,000 (combines interest and principal)
Intrend Int'l, Inc. and The Imperial Iranian Air Force, Award No. 59-220-2	12%
Gruen Associates, Inc. and Iran Housing Co., Award No. 61-188-2	Award of $500,000 "includes interest"

ATTACHMENT 1 to letter of
Stewart Abercrombie Baker

RAM Int'l Industries, Inc. and The Air Force of Iran, Award No. 67-148-1	10%
Chas. T. Main Int'l, Inc. and Mahab Consulting Engineers, Inc., Award No. 70-185-3	10%
Alan Craig and Ministry of Energy, Award No. 71-346-3	10%
Woodward-Clyde Consultants and Iran, Award No. 73-67-3	10%
Blount Bros. Corp. and Ministry of Housing & Urban Development, Award No. 74-62-3	10%
Dames & Moore and Iran, Award No. 97-54-3	10%
American International Group, Inc. and Iran, Award No. 93-2-3	8.5%
William L. Pereira Associates, Iran and Iran, Award No. 116-1-3	6%
T.C.S.B. Inc. and Iran, Award No. 114-140-2	12%
Schering Corp. and Iran, Award No. 122-38-3	
General Dynamics Corp. and Iran Award No. 123-283-3	10%
Gould Marketing Inc. and Ministry of Defense, Award No. 136-49/50-2	10% (awarded to Respondents)
Time, Inc. and Iran, Award No. 139-166-2	12%
Lischem Corp. and AEOI, Award No. 140-194-2	12%
TAMS and TAMS-AFFA Consulting Engineers of Iran, Award No. 141-7-2	12%

ATTACHMENT 1 to letter of
Stewart Abercrombie Baker

Morrison-Knudsen Pacific Ltd. and MORT, Award No. 143-127-3	10%
Harnischfeger Corp. and MORT, Award No. 144-180-3	10%
R.J. Reynolds Tobacco Co. and Iran, Awards Nos. 145-35-3 and 166-35-3	15.11%
DIC of Delaware, Inc. and Tehran Development Corp., Award No. 176-255-3	10% (on $2.77 million) 8% (on $796,500)

ATTACHMENT 2
TO LETTER OF STEWART ABERCROMBIE BAKER

Add to the end of paragraph 3(a), S.1166:

Provided, however, that no deduction shall be made from the portion of the aggregate amount that was awarded as interest by the Iran-United States Claims Tribunal. If an award, including an award on agreed terms, does not state the amount awarded as interest (and does not expressly deny an award of interest), it shall be presumed that interest was awarded at 12% per year from January 19, 1981 until the date of payment to the Federal Reserve Bank of New York.

[Whereupon, at 3:10 p.m., the committee adjourned, subject to call of the Chair.]

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